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The RIAA v. The People: The Recording Industry's Misguided Attempt to Use the Legal System to Save Their Business Model

“There is a point when the public at large embraces a new idea and there is no turning back. For the music industry, that point has passed. What we need to acknowledge now is that as attitudes, values, behavior and societal mores evolve and change, the rules change. Today’s taboo becomes tomorrow’s normal, acceptable, legal behavior. However, when the rules don’t change and lose step with the times, ordinary, otherwise law-abiding people ‘flaunt’ the rules. Anyone remember Prohibition?”¹

~~ Fred Goldring, Billboard magazine

1. Fred Goldring, *Abandon the ‘Shock and Awe’ Tactics: An Eight-Step Recovery Program for a Healthier Music Industry*, BILLBOARD, Oct. 25, 2003, at 14. Mr. Goldring describes himself as “someone who earns a living working with musicians, record companies and publishing companies.” *Id.* In addition to being a columnist for Billboard magazine, Mr. Goldring is also a musician. *Id.*

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Instead of providing music lovers with the product they desire – MP3s that are available to be downloaded from online “stores” – the music industry has decided to sue its own customers. Between September 2003 and January 2005, it filed suit against more than 8,400 “alleged song-

swappers,” with more lawsuits sure to come.² The music industry, led by the Recording Industry Association of America (RIAA), has shown a desire to file suit against anyone who stands in their way. The RIAA has already filed lawsuits against people such as Brianna LaHara, a twelve-year-old honor student,³ Janet Bebell, a fifty-four-year-old self-described “gray-haired, middle-aged woman” from Colorado,⁴ Durwood Pickle, a seventy-one-year-old grandfather from Texas;⁵ Sarah Seabury Ward, a sixty-six-year-old grandmother from Massachusetts whom the RIAA claimed was sharing the song “I’m a Thug” by Trick Daddy;⁶ and Dr. Timothy Davis, a Yale professor.⁷ They even sued a dead lady.⁸ Perhaps most appalling, however, is that approximately 100 midshipmen at the U.S. Naval Academy could face a court-martial for having copyrighted songs on their computer.⁹ You could very well be next, even if you do not personally share files over the internet.¹⁰

2. Grant Gross, *RIAA Files 717 New File-Trading Lawsuits*, InfoWorld.com, Jan. 27, 2005, at http://www.infoworld.com/article/05/01/27/HNriaanewsuits_1.html (last visited Jan. 29, 2005) (on file with author).

3. *Download Suit Targets 12-Year-Old*, CBSNews.com, Sept. 9, 2003, <http://www.cbsnews.com/stories/2003/09/09/tech/main572426.shtml> (last visited Mar. 2, 2004) (on file with author).

4. Jefferson Graham, *RIAA Lawsuits Bring Consternation, Chaos*, USA TODAY, Sept. 10, 2003, at 4D. As Ms. Bebell pointed out, “a gray-haired, middle-aged woman going to court to defend herself from charges that she downloaded music by a band called Incubus [would] get a laugh.” *Id.*

5. *Download Suit Targets Twelve-Year-Old*, *supra* note 3.

6. *RIAA Goes After the Wrong Gal*, Wired.com, Sept. 24, 2003, <http://www.wired.com/news/digiwood/0,1412,60581,00.html> (last visited Mar. 2, 2004) (on file with author). Mrs. Ward owns an Apple Macintosh, “which cannot even run the Kazaa file-sharing service [that she and her husband] are accused of using illegally.” *Id.*

7. *Download Suit Targets Twelve-Year-Old*, *supra* note 3.

8. Andrew Orlowski, *RIAA Sues the Dead*, THE REGISTER, Feb. 5, 2005, http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/ (last visited Feb. 12, 2005) (on file with author). In early 2005, the RIAA sued eighty-three-year-old Gertrude Walton, who passed away in December 2004, “claiming that she made more than 700 songs available on the internet.” *Id.* The RIAA chose to file this lawsuit even though her daughter “sent a copy of [Ms. Walton’s] death certificate to record company lawyers in response to an initial warning letter, over a week before the suit was filed.” *Id.* “An RIAA spokesperson said that it would try and dismiss the case.” *Id.* (emphasis added).

9. Noah Shachtman, *Pirates of the U.S. Naval Academy*, Wired.com, Nov. 25, 2002, at <http://www.wired.com/news/digiwood/0,1412,56574,00.html> (last visited Dec. 17, 2003) (on file with author).

10. “The recording industry said it named as the defendant in each lawsuit the person who paid for the household Internet account.” *Music Industry Settles Copyright Lawsuits Against 12-year-old Girl*, USAToday.com, at http://www.usatoday.com/tech/news/techpolicy/2003-09-09-kid-pays-riaa_x.htm (last visited Mar. 27, 2005). As a result, if anyone shares files by using an internet account that you pay for, you run the very real risk of being dragged into court by the RIAA. See *infra* notes 180-85 and accompanying text.

I. INTRODUCTION

When the cassette tape hit the market in the late 1970's, sales of vinyl records and eight-tracks went into a steep decline, eventually leading to their near-total demise.¹¹ Compact discs were introduced in 1982, and after a slow start due to high prices, they eventually overtook cassettes as the medium of choice for music.¹² However, neither of these events had any *net effect* on the sales of albums by the music industry, because the music industry kept up with the times: the sales that they lost from tapes were replaced by the sales that they gained from compact discs (CDs).¹³ With the advent of MP3 files, history tells us to expect the decline of the outdated form of digital media, i.e., CDs, and that is exactly what is beginning to happen.¹⁴ CD sales have plummeted in recent years, but contrary to what the recording industry would like us to think, it's not due to piracy – it is due to the music industry's failure to keep up with technology.¹⁵ People want their songs in MP3 format, and since the music industry is not offering it, they have to turn elsewhere to find it.¹⁶

The response of the music industry, led by the RIAA,¹⁷ has been to sue everyone from Napster to their own customers.¹⁸ Part II of this Comment will begin the process of explaining these lawsuits by providing a brief introduction into the world of MP3s and peer-to-peer file sharing, and Part

11. See *The History of Sound Recording Technology: Portable Music*, About.com, <http://inventors.about.com/gi/dynamic/offsite.htm?site=http://www.recording%2Dhistory.org/> (last visited Mar. 2, 2004) (on file with author).

12. See *The History of Sound Recording Technology: The Digital Era*, About.com, <http://inventors.about.com/gi/dynamic/offsite.htm?site=http://www.recording%2Dhistory.org/> (last visited Mar. 2, 2004) (on file with author).

13. See *id.*

14. See *id.*

15. The decline in music sales can also be partially attributed to the poor economic climate of the last few years. See *At Last, A Market Solution*, BILLBOARD, Sept. 20, 2003, at 10. Other factors include "high CD prices and substandard music." Chris Nelson, *CD Sales Rise, but Industry Is Still Wary*, N.Y. TIMES, Feb. 23, 2004, at C1.

16. Granted, a music lover could purchase a CD, and then "rip" the songs from that CD and convert them into MP3 files, but unfortunately most people do not know how to do this. For the average American, the only way to obtain MP3 files is to download them from their peers.

17. The RIAA "is the trade group that represents the U.S. recording industry." *About Us*, Recording Industry Association of America, at <http://www.riaa.com/about/default.asp> (last visited Mar. 27, 2005) (on file with author).

18. As the Ninth Circuit recently noted, starting with "the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners, often resulting in federal litigation." *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1158 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004). The *Grokster* court went on to point out that

[t]he introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player.

Id. at 1167. As a result of the above, "it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude," especially since courts are "ill-suited to fix the flow of internet innovation." *Id.*

III will add to that foundation by summarizing the basics of copyright law. Parts IV and V will then deal with various issues that have arisen from the mass of litigation that has taken place over the last few years because of these new technologies, and especially because of the failure of the music industry to keep up with these new technologies.¹⁹ Lastly, Part VI will discuss various solutions to the problems presented by the RIAA's battle against its own customers, and also offer a few feasible alternatives to the current soap opera of litigation that has pitted *The RIAA v. The People*.

II. BACKGROUND: MP3s, FILE-SHARING, AND THE DIGITAL MUSIC REVOLUTION

A. MP3s and File-Sharing: The Technology That Started This Whole Mess

More Americans share MP3 files "than have voted in some recent presidential elections."²⁰ Some of these same people may soon be facing a lawsuit by the RIAA, even though they may not understand why the music industry is so upset about file-sharing. Before that issue is addressed, however, a brief explanation of the underlying technology may be helpful.

1. What is an MP3?

The term "MP3" is short for "MPEG audio Layer-3."²¹ "MPEG" is an acronym that stands for "Moving Picture Experts Group," which is a group that has developed various techniques to compress video data so that movies can take up less digital memory, thereby enabling an entire movie to be stored on a single DVD.²² Since a movie consists of images as well as sound, part of the compression process required a method to compress the movie's sound.²³ The method that the Moving Picture Experts Group devised is known as MPEG audio Layer-3, more commonly called MP3.²⁴ Thus, an MP3 is simply a compressed²⁵ audio file.²⁶

19. While finding in favor of the RIAA "would satisfy [their] immediate economic aims," the courts have thus far been of the opinion that such a holding would not only "conflict with binding precedent," but it would also be "unwise." *Id.* at 1166.

20. Barbara Quint, *At War with Copyright*, Information Today, Oct. 2003, at 7.

21. Marshall Brain, *How MP3 Files Work*, HowStuffWorks.com, at <http://computer.howstuffworks.com/mp3.htm/printable> (last visited Apr. 5, 2005) (on file with author).

22. *Id.*

23. See *A & M Records, Inc. v. Napster, Inc.*, 2000 WL 573136, at *1, n.1 (N.D. Cal. 2000).

24. Brain, *supra* note 21.

25. In plain English, compressing a file simply means reducing its size without sacrificing the quality or completeness of the data. Tom Harris, *How File Compression Works*, HowStuffWorks.com, at <http://computer.howstuffworks.com/file-compression.htm> (last visited Feb. 28, 2004) (on file with author).

26. Brain, *supra* note 21.

MP3s are created using a technique known as “perceptual noise shaping,” which applies certain “characteristics of the human ear.”²⁷ Perceptual noise shaping works by eliminating certain parts of a song that the human ear cannot hear anyway.²⁸ For example, if two or more sounds are playing simultaneously, the human ear can only hear the louder one.²⁹ As a result, the frequency band that accounts for the quieter sounds can be eliminated when compressing the file into MP3 format.³⁰ This is but one of many “tricks” that are applied to reduce the file size of songs by eliminating the sounds that the human ear cannot detect.³¹ Combining these auditory “tricks” with other standard file compression techniques results in a file whose size is reduced by at least a factor of ten.³²

The effectiveness of this technique cannot be understated. For example, a regular CD requires 176,000 bytes of memory to store one second of a song,³³ and considering that an average song is about three minutes long, each song therefore takes up approximately thirty-two megabytes³⁴ (MBs) of hard drive space when stored in its uncompressed format.³⁵ The same song compressed into an MP3 file would only take up about three MBs of digital memory.³⁶

2. Why All the Fuss Over MP3s?

The most obvious advantage of MP3s is that they take up significantly less space on your hard drive than uncompressed audio files.³⁷ For instance, a collection of 1,000 songs stored in an uncompressed format would take up approximately thirty-one gigabytes (GBs) of memory – virtually your entire hard drive.³⁸ That same collection in MP3 format would only take up a miniscule three GBs on your hard drive.³⁹

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* Songs on CDs are generally stored in a file format known as “WAV,” which requires significantly more memory than MP3 files. *MP3 & Digital Music Audio Guide*, Viewz.com, at <http://www.viewz.com/shoppingguide/musicguide.shtml> (last visited Feb. 26, 2004) (on file with author).

34. One megabyte of data is equivalent to 1,048,576 bytes. *Megabyte*, Webopedia.com, at <http://www.webopedia.com/TERM/M/megabyte.html> (last visited Feb. 28, 2004) (on file with author).

35. Brain, *supra* note 21.

36. *Id.*

37. *Id.*

38. A three-minute-long song stored in an uncompressed format requires approximately 32 MBs of memory. *See id.* Thus, 1,000 such songs would require approximately 32,000 MBs of memory, which is equivalent to 31.25 GBs. *See Gigabyte*, Webopedia.com, at <http://www.webopedia.com/TERM/G/gigabyte.html> (last visited Feb. 28, 2004) (on file with author) (defining one gigabyte as the equivalent of 1,024 megabytes).

39. That same three-minute-long song stored as an MP3 would consume approximately 3 MBs of memory. *See Brain, supra* note 21. Therefore, 1,000 such songs would only take up

Because of their small file size, they can easily be uploaded to portable MP3 players.⁴⁰ The current crop of portable MP3 players can hold approximately four hours of music⁴¹ which a listener can then take with him or her when on the go. Unlike CDs, MP3s do not “skip” when the player gets bumped around, as may happen, for example, when he or she is jogging.⁴² MP3 players, most of which fit in the palm of your hand, are also substantially smaller and more portable than any CD player on the market.⁴³

Last, but certainly not least, MP3s can be transferred over the internet much more quickly than uncompressed audio files, via a process known as file-sharing.⁴⁴ Any type of file may be shared, including text, images, and video,⁴⁵ but for the purposes of this article we are only concerned with digital audio files. Although music files may be shared regardless of the file format that they are stored in, MP3 files are one of the most commonly

approximately 3,000 MBs, or 2.9 GBs of digital memory. See *Gigabyte*, *supra* note 38 (defining one gigabyte as the equivalent of 1,024 megabytes).

40. For around \$200, a music lover can purchase an MP3 player that holds approximately four hours of songs recorded in MP3 format, has a built-in FM radio tuner, can function as a digital voice recorder, and still fits in the palm of your hand. As of this writing, some of the more popular devices that fit this description include the iRiver iFP-390T, at <http://www.bestbuy.com/site/olspage.jsp?id=1051806328065&skuId=5446957&type=product&productCategoryId=pcmcat10200050002> (last visited Jan. 25, 2004) (on file with author); MPIO's model FL100256MB digital audio player, at <http://www.bestbuy.com/site/olspage.jsp?id=1057490619280&skuId=5767388&type=product&productCategoryId=pcmcat10200050002> (last visited Jan. 25, 2004) (on file with author); and Creative's 256MB Rhomba, at <http://us.creative.com/shop/shopcategory.asp?category=3> (last visited Jan. 25, 2004) (on file with author).

41. Since an uncompressed audio file requires roughly 32 MBs of memory, only eight such songs could be stored on an MP3 player with 256 MB of memory. See discussion *supra* Part II.A.1. Fortunately, the MP3 format enables a listener to store approximately four hours of music, or about eighty songs, on that same MP3 player. *Id.*

42. MP3s are generally stored in “flash memory” within a portable MP3 player. Brain et al., *How MP3 Players Work*, HowStuffWorks.com, at <http://electronics.howstuffworks.com/mp3-player.htm/printable> (last visited Apr. 5, 2005) (on file with author). Flash memory is a “solid state storage device,” which “means that there are no moving parts” associated with this type of memory; everything is electronic, rather than mechanical. Jeff Tyson, *How Flash Memory Works*, HowStuffWorks.com, at <http://computer.howstuffworks.com/flash-memory.htm/printable> (last visited Mar. 1, 2004) (on file with author). Because there are no moving parts, an MP3 player with flash memory cannot skip like a CD player, which must spin the CD in order to read it and play the music stored on it. Brain et al., *supra*.

43. Most MP3 players are about three inches by five inches, and weigh only a few ounces. Brain et al., *supra* note 42. Contrast this with a CD player, which must be at least as large as a CD, meaning that it cannot possibly fit into the palm of an average person's hand.

44. Brain, *supra* note 21. Over a standard 56K modem, an uncompressed audio file would take approximately two hours to download, whereas the same song in MP3 format can be transferred in a matter of minutes. *Id.*

45. See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035-36 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004) (discussing various types of files that can be shared using P2P software, including movie trailers, books, documents, and other media content).

shared digital song formats, primarily because they take up less memory than uncompressed songs.⁴⁶

3. How Does File-Sharing Work?

File-sharing occurs over something called a peer-to-peer (P2P) network,⁴⁷ the most popular of which are Kazaa⁴⁸ and Gnutella.⁴⁹ In order to use a P2P network such as these, one must install file-sharing software, such as Kazaa Media Desktop,⁵⁰ Morpheus, or WinMX, on his or her computer.⁵¹ Although there are technical differences between the various P2P networks, they are all very similar.⁵² Without going into too much technical detail,⁵³ file-sharing basically works as follows: First, using the “search” feature of his or her file-sharing program of choice, the user enters the name of the song that he or she wants to find.⁵⁴ The program then sends out a query over its network, essentially “asking” other computers that are connected to the same P2P network if they have the song saved on their hard drive.⁵⁵ Based on the responses of the other computers on the P2P network, the user’s file-sharing program builds a list of available files that satisfy the user’s query.⁵⁶ The user can then select a song or songs from this list to download to his or her computer.⁵⁷

B. Why Does the Digital Music Revolution Scare the Music Industry?

As was demonstrated above, MP3s are clearly superior to CDs.⁵⁸ Unfortunately for audiophiles, instead of embracing this new technology, the

46. See Brain, *supra* note 21.

47. Napster created the original P2P network, but was forced into bankruptcy by the RIAA. See discussion *infra* Part V.A. Napster has since reinvented itself as an online music store offering legal downloads. See discussion *infra* Part V.A.

48. Kazaa Information Center, FileSharingWatch.com, at <http://www.filessharingwatch.com/kazaa.php> (last visited Jan. 21, 2004) (on file with author); see also Powell Fraser, *Secret Networks Protect Music Swappers*, CNN.com, at <http://www.cnn.com/2003/TECH/internet/07/29/private.filesshare/> (last visited Jan. 21, 2004) (on file with author).

49. Marshall Brain, *How File Sharing Works*, HowStuffWorks.com, at <http://computer.howstuffworks.com/file-sharing.htm/printable> (last visited Jan. 21, 2004) (on file with author).

50. Kazaa Information Center, *supra* note 48. According to Kazaa.com, the Kazaa file-sharing program has been downloaded over 383,000,000 times as of February 14, 2005. Kazaa, <http://www.kazaa.com/us/index.htm> (last visited Feb. 14, 2005) (on file with author).

51. Brain, *supra* note 49.

52. The primary difference is that, while Gnutella allows various client programs, such as BearShare, Xolox, Limewire, Morpheus, and WinMX, to access its network, the Kazaa network can only be accessed by users who are running the Kazaa Media Desktop family of software. See *id.*; Kazaa Information Center, *supra* note 48; Gnutella Information Center, FileSharingWatch.com, at <http://www.filessharingwatch.com/gnutella.php> (last visited Jan. 21, 2004) (on file with author).

53. For a slightly more detailed description, see MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154, 1158-60 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

54. Brain, *supra* note 49.

55. *Id.*

56. *Id.*

57. *Id.*

58. See *supra* notes 33-46 and accompanying text.

music industry has missed the proverbial boat and is in quite a bind as a result.⁵⁹ Due in part to the explosion of file-sharing over the last few years, CD sales have dramatically declined.⁶⁰ The RIAA blames this decline in sales on the fact that users can download songs for free over the internet instead of purchasing CDs for \$16.99 or more.⁶¹

The reality of the situation is that MP3 technology is a significant improvement on CDs, which until recently was the best technology that the music industry offered its customers.⁶² In addition to the primary advantages discussed above,⁶³ there are other reasons why MP3s are vastly superior to CDs. For instance, there is no longer any need to clutter one's bedroom with piles of CDs; instead, a music lover can store a virtually unlimited number of songs in a music library on his computer.⁶⁴

There are advantages from the music industry's point of view as well, although it is just starting to realize this.⁶⁵ For starters, MP3 files eliminate the problem of unsold inventory because a record label could simply sell a downloadable MP3 version of songs online, rather than burning CDs for sale in a store. The flip side of this is that stores would never sell out of a CD because every song created could be perpetually available online.

The MP3 file format also makes it very easy for new artists to distribute their music digitally over the internet; gone forever are the days of fledgling

59. Unlike other advancements in the music industry, such as cassette tapes and CDs, MP3s are unique in that they were brought to the forefront of the music scene by music lovers, rather than by the music industry. Brain, *supra* note 21; see also *A Reason to Be Upbeat*, BILLBOARD, Feb. 7, 2004, at 12 (pointing out that "for the past three years, the music industry has been caught in a classic situation where events – both economic and technological – have been driving change rather than the industry itself").

60. See, e.g., *A Reason to Be Upbeat*, *supra* note 59 (noting that over the course of the last three years, the music "industry has declined . . . from \$40 billion to \$28 billion," and that "its long-established business model, built around the sale of CDs through retail outlets, is a shambles").

61. See, e.g., David McGuire, *Recording Industry Sues File Swappers*, washingtonpost.com, at <http://www.washingtonpost.com/ac2/wp-dyn/A42637-2003Sep8?language=printer> (Sept. 8, 2003) (on file with author) (stating that file sharing is estimated to have cost the music industry "more than a billion dollars in lost CD sales between 2000 and 2002," including \$700 million in 2002 alone). But see *At Last, A Market Solution*, *supra* note 15 (noting that the music "industry is suffering through a sharp, three-year downturn in sales" due chiefly to "the sour economy").

62. The music industry has only recently begun to sell MP3s online. See discussion *infra* Part VI.

63. See discussion *supra* Part II.A.

64. Since an average song stored as an MP3 only requires about 3 MBs of hard drive space, you would only need around 2.9 GBs of digital memory to store 1,000 such songs on your computer. See discussion *supra* Part II.A.2. The hard drives on a laptop computer are typically at least 20 GB, and it is common for a desktop to have hard drives that can hold upwards of 80 GB of memory. See, e.g., Featured Notebook, Dell.com, at http://www1.us.dell.com/content/products/features.aspx/featured_notebook1?c=us&cs=19&l=en&s=dhs (last visited Mar. 2, 2004) (on file with author); Featured Systems, Dell.com, at http://www1.us.dell.com/content/products/features.aspx/advertised_dimen3?c=us&cs=19&l=en&s=dhs (last visited Mar. 2, 2004) (on file with author).

65. The music industry has just started to take advantage of the superiority of the MP3 file format. See discussion *infra* Part VI.

artists selling CDs out of the trunks of their cars.⁶⁶ The music industry does not like this, of course, because there will not be as much need for its overpriced services.⁶⁷

Instead of embracing this new technology, the recording industry has instead attempted to use the court system to stop it.⁶⁸ In order to save its business model, the RIAA is essentially asking the courts to stop technology from progressing.⁶⁹ It is doing this by filing lawsuits against its own

66. See Brain, *supra* note 21 (noting that “[i]f you are an artist who is recording music at home or in a small studio, you can use MP3 files and the Web to distribute your music to an extremely large audience”).

67. Artists typically only receive “a 15% royalty on the wholesale price” of their album. Brian Garrity, *All Aboard the Digital Train?*, BILLBOARD, Sept. 20, 2003, at 23, 25. Thus, when someone spends twenty dollars on a CD, only three of those dollars will ever make their way to the artist, who may often have to split that profit with his or her band mates. See *id.* The rest of the money goes to the record company to pay for things such as packaging, technology, and “free goods.” *Id.* Even in this age of online distribution of music, however, record companies still “have the chutzpah to take a packaging deduction on a digital download sale where there is no package, [thus giving] new meaning to the old tale about the emperor’s new clothes.” Samantha Chang, *Stage Is Set for Battle Royal(ties)*, BILLBOARD, Feb. 7, 2004, at 18 (quoting artist attorney Bob Donnelly).

As further evidence of why the recording industry would sooner sell CDs than offer digital downloads, one commentator points out that

CD burners didn’t just make it easy to copy CDs, they made people realize that CDs cost almost nothing to make. On the same record store shelf, stacks of 30 cent blank CDs sit next to the record companies’ \$16 jewel cases. And if it costs a regular person 30 cents to make a perfect copy on their home computer, imagine how little it costs when you own a factory. Even if you’ve never burned a CD in your life, you feel like an idiot paying \$16 for CDs when you know you don’t have to anymore. Furthermore, people know a lot more these days about how the music industry works – at least they understand that not much of the \$16 ends up in musician’s hands. We’ve all watched multi-platinum bands on Behind the Music file for bankruptcy before they realize how much of a scam their record contract was.

Civil Disobedience, p2p, DownHillBattle.org, at <http://www.downhillbattle.org/articles/civil.php?PHPSESSID=7acafb38083daa6cc954f>, Aug. 26, 2003 (last visited Jan. 27, 2004) (on file with author).

68. The music industry shut down Napster, the first file-sharing program. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Then the industry began to sue its own customers. See, e.g., Recording Indus. Ass’n of Am. v. Verizon Internet Serv’s, Inc., 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004). It is currently trying to shut down the new wave of file-sharing programs as well. See, e.g., MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff’d*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004). These cases will be discussed in greater detail in Parts IV and V of this Comment.

69. In the *Sony* case, for example, the Supreme Court reasoned that:

It seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively, much less the two respondents in this case, the exclusive right to distribute [VCRs] simply because they may be used to infringe copyrights. That, however, is the logical implication of their claim. The request for an injunction below indicates that respondents seek, in effect, to declare [VCRs] contraband.

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 441 n.21 (1984). This sentiment was echoed in the *Grokster* appeal by Michael Page, the attorney who represented Grokster at oral arguments before the Ninth Circuit:

Regulating technologies in their infancy is a bad idea. Imagine had the Supreme Court agreed with appellants [in the *Sony* case] and had said that VCR’s [sic] are illegal Today, VCR’s [sic] garner more income for the music industry than movies. They would not exist had the studios gotten their wish and had them banned. They told the world that the VCR was to copyright as the Boston Strangler is to a woman alone at home and predicted that it would be the death of copyright. This is not a new theme. *Every time* a new technology comes along, those with a vested interest in the old technology first ask

customers for direct copyright infringement,⁷⁰ and also by attempting to shut down the file-sharing services themselves through litigation based on theories of secondary copyright infringement.⁷¹ Before the issues presented by these lawsuits can be analyzed, however, a brief primer on the basics of copyright law is necessary.

III. A PRIMER ON COPYRIGHT LAW

A. Copyright Protection

A copyright protects “original works of authorship fixed in any tangible medium of expression.”⁷² Musical works, including the lyrics of a song, qualify as a “work of authorship,”⁷³ and are thus afforded copyright protection⁷⁴ as long as they are both “original” and “fixed in any tangible medium of expression.”⁷⁵ In order for a work to be fixed in a tangible medium of expression, “its embodiment in a copy or phonorecord. . . [must be] sufficiently permanent or stable to permit it to be perceived, reproduced,

the courts to ban it. Thankfully, the courts say no, and when they do, the copyright holders then find a way to make money off that new technology. Because every time technology removes the transaction costs between the artists and the consumer, that leaves money available for the artists. Radio was going to be the death of copyright. [The music industry said,] “How can we compete with free? You’re sending our music out into the airwaves for free for anyone to have.” But when courts decline to stop technology, people find a way to develop those technologies to further develop non-infringing uses of those technologies, and to monetize them, and in the long run it is always good for the consumers and the copyright holders. Efficiency is good for everybody, and these systems are simply more efficient versions of distribution. They have now reduced distribution costs, not low, but to zero. Courts should not step in and stop that progress.

Oral Argument of Respondents, *MGM Studios, Inc. v. Grokster, Ltd.*, Nos. 03-55894 & 03-56236 (9th Cir. Feb. 3, 2004) (emphasis added), available at <http://www.groklaw.net/article.php?story=20040823002045984> (last visited Mar. 2, 2004) (oral argument on file with author in MP3 format).

70. See, e.g., *Verizon*, 351 F.3d at 1229.

71. See, e.g., *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003), cert. denied, 124 S. Ct. 1069 (2004); *Napster*, 239 F.3d at 1004; *Grokster*, 259 F. Supp. 2d at 1029.

72. 17 U.S.C. § 102(a).

73. *Id.* § 102(a)(2).

74. A copyright automatically attaches to a qualifying work at the instant that it is created; no paperwork has to be filed in order for the copyright to attach. See *id.* § 408(a) (pointing out that registration of a copyright is “permissive” because it “is not a condition of copyright protection”); see also MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 7.4 (3d ed. 1999) (“Copyright protection begins not with registration, but when an author creates a work by fixing it in a tangible medium of expression.”). However, most artists register their works with the United States Copyright Office because doing so is a prerequisite for bringing an action for infringement. See 17 U.S.C. § 411(a) (stating that “no action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title”).

75. *Id.* § 102(a).

or otherwise communicated for a period of more than transitory duration.”⁷⁶ As such, a copyright clearly attaches to any original song, whether stored on a cassette tape, CD, or as a digital audio file on your computer or portable MP3 player.⁷⁷

B. Copyright Infringement

Certain “exclusive rights” are afforded to the owner of a copyright,⁷⁸ including, *inter alia*,⁷⁹ the rights to both “reproduce the copyrighted work” and “to distribute copies . . . of the copyrighted work.”⁸⁰ Copyright infringement occurs whenever any of these exclusive rights are violated by another person.⁸¹ Three types of copyright infringement exist: direct, contributory, and vicarious.⁸²

Direct infringement occurs whenever someone personally “violates any of the exclusive rights of the copyright owner.”⁸³ For purposes of this Comment, the best examples of direct infringement are reproducing a copyrighted song by downloading a copy of it from someone else’s computer and distributing a copyrighted song in MP3 format by sharing it over a P2P network.⁸⁴ Because intent is not an element of direct infringement, it is not a valid defense for the infringer to say that he was

76. *Id.* § 101. A “phonorecord” is a material object “in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.*

77. *See, e.g.,* Recording Indus. Ass’n of Am. v. Verizon Internet Serv’s, Inc., 351 F.3d 1229 (D.C. Cir. 2003) (stating that Verizon customers were suspected of infringing copyrights by sharing MP3 files), *cert. denied*, 125 S. Ct. 309 (2004); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004) (finding that Aimster users directly infringed copyrights by sharing MP3 files); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (finding that Napster users directly infringed copyrights by sharing MP3 files).

78. 17 U.S.C. § 501(a).

79. *See id.* § 106 (listing all the exclusive rights of a copyright owner).

80. *Id.* § 106(1), (3).

81. *Id.* § 501(a). There are several limitations on these exclusive rights, the most important of which is the doctrine of “fair use.” *Id.* § 107. The other limitations are codified at sections 108 through 112 of Title 17 of the United States Code. These limitations generally do not pertain to the file-sharing issues discussed within this Comment, although Napster unsuccessfully raised the “fair use” defense in their litigation with A&M Records. *See Napster*, 239 F.3d at 1014-19. For an excellent discussion of the aforementioned limitations on a copyright holder’s exclusive rights, see Michael J. Remington, Esq., Education Task Force of the Joint Committee of the Higher Education and Entertainment Communities, *Background Discussion of Copyright Law and Potential Liability for Students Engaged in P2P File Sharing on University Networks*, available at http://www.eff.org/IP/P2P/P2P_Joint_Committee_paper.pdf, and <http://www.acenet.edu/washington/legalupdate/2003/P2P.pdf#xml=http://acenet.edu/SCRIPTS/texis.exe/Webinator/search/xml.txt?query=copyright+remington&pr=ACEnet&order=dd&cq=&id=4025cd0715> (last visited Feb. 7, 2004) (on file with author).

82. *See* Remington, *supra* note 81, at 5; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434-35 (1984).

83. 17 U.S.C. § 501(a); *see also* Sony, 480 F. Supp. at 457-62; Remington, *supra* note 81, at 5; Fred von Lohmann, IAAAL: What Peer-to-Peer Developers Need to Know About Copyright Law (v. 3.0), EFF.org, Dec. 2003, at http://www.eff.org/IP/P2P/p2p_copyright_wp.php (last visited Feb. 10, 2004) (on file with author).

84. *See Napster*, 239 F.3d at 1014.

unaware that he was sharing the song.⁸⁵ This is particularly worrisome because the RIAA itself admits that “the majority of the users [of the various file-sharing programs] were unable to tell what files they were sharing, and sometimes incorrectly assumed they were not sharing any files when in fact they were sharing all [of the] files on their hard drive.”⁸⁶

Unlike direct infringement, which makes a person answer for his own infringing actions, contributory and vicarious liability are ways to hold a person liable for an infringement committed by someone else.⁸⁷ Contributory infringement is copyright law’s answer to the criminal act of aiding and abetting.⁸⁸ In addition to proving that someone directly infringed upon his copyright,⁸⁹ a copyright owner must allege two elements to establish a *prima facie* case of contributory infringement: (1) knowledge⁹⁰ and (2) material contribution.⁹¹ The first of these elements requires that the defendant had either actual or constructive knowledge of the infringing activity.⁹² The second element, which is much simpler than the first, merely requires that the defendant facilitated, encouraged, assisted, or otherwise

85. *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 299 (3d Cir. 1991) (noting that “innocent intent is generally not a defense to copyright infringement”); *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 989 (D. Minn. 1986) (“Intent is not an element of copyright infringement and, thus, absence of intent is not a valid defense to a claim of copyright infringement.”); see also 17 U.S.C. § 501(a) (stating that “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright” without making any mention of intent); Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 356 (2002) (pointing out that courts “have consistently held that intent to infringe is irrelevant in determining liability for copyright infringement”).

86. *Backgrounder News Memo Debunking Myths Raised by Verizon in Court Dispute*, RIAA.com, at http://www.riaa.com/news/filings/verizon_backgrounder.asp (last visited Jan. 25, 2004) (on file with author) (internal quotations omitted).

87. See *Sony*, 464 U.S. at 434-35. Even though “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,” the *Sony* Court noted that “[t]he absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity.” *Id.*

88. *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004).

89. *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1160 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

90. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019-22 (9th Cir. 2001); see also *Grokster*, 380 F.3d at 1160; Remington, *supra* note 81, at 5 (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

91. See *Grokster*, 380 F.3d at 1160; *Napster*, 239 F.3d at 1022; see also Remington, *supra* note 81, at 5 (quoting *Gershwin*, 443 F.2d at 1162). In order to establish “material contribution,” the copyright holder must prove that the defendant “cause[d] or materially contribute[d] to the infringing conduct of” the third-party. See von Lohmann, *supra* note 83.

92. See *Sony*, 464 U.S. at 487 (Blackmun, J., dissenting) (stating that “a finding of contributory infringement has never depended on actual knowledge of particular instances of infringement; it is sufficient that the defendant have reason to know that infringement is taking place”); see also *Napster*, 239 F.3d at 1020 (noting that “[c]ontributory liability requires that the secondary infringer ‘know or have reason to know’ of direct infringement”).

materially contributed to the infringing activity.⁹³ It is the file-sharing programs – rather than the people who are actually sharing the files – that are generally forced to defend claims of contributory infringement.⁹⁴

Vicarious infringement stems from the legal principle of *respondeat superior*.⁹⁵ Like a claim of contributory infringement, a copyright owner alleging vicarious infringement must also prove that someone directly infringed upon his copyright.⁹⁶ In addition, there are two other elements to a claim of vicarious infringement: (1) financial interest and (2) supervision.⁹⁷ The first element, which is rather straightforward (at least for our purposes), requires that the defendant received a direct financial benefit from the activity in question.⁹⁸ The second element, which is more controversial, requires that the defendant had “the right and ability to supervise its users’ conduct.”⁹⁹ Unlike contributory infringement, a person can be held liable under this theory even if he is “completely unaware of [the] infringing activity.”¹⁰⁰ Similar to contributory infringement, the issue of vicarious infringement often rears its ugly head in cases involving the file-sharing programs themselves.¹⁰¹

1. The Betamax Defense

The “Betamax defense” arises from *Sony Corp. of America v. Universal City Studios, Inc.*, a 1984 case involving the Sony Betamax video tape recorder.¹⁰² In a groundbreaking decision,¹⁰³ the United States Supreme

93. *Napster*, 239 F.3d at 1019; see also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (holding that defendants “materially contributed to the infringing activity” where “it would [have been] difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by” them).

94. See, e.g., *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003), cert. denied, 124 S. Ct. 1069 (2004); *Napster*, 239 F.3d at 1004; *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003); see also discussion *infra* Part V.

95. *Napster*, 239 F.3d at 1022 (citing *Fonovisa*, 76 F.3d at 262); see also von Lohmann, *supra* note 83 (“Vicarious infringement is derived from the same legal principle that holds an employer responsible for the actions of its employees.”). *Respondeat superior* is a legal doctrine that holds an employer liable for the wrongful acts that his employee committed within the scope of his employment. BLACK’S LAW DICTIONARY 1313 (7th ed. 1999).

96. *Grokster*, 380 F.3d at 1164; see also *Gordon v. Nextel Communications*, 345 F.3d 922, 925 (6th Cir. 2003) (noting that “[v]icarious liability exists when (1) a defendant has the right and ability to supervise the infringing conduct [of another] and (2) the defendant has an obvious and direct financial interest in the infringement”); *Napster*, 239 F.3d at 1022 (stating substantially the same rule as *Gordon*); see also von Lohmann, *supra* note 83.

97. *Gordon*, 345 F.3d at 925; *Napster*, 239 F.3d at 1022-24; see also von Lohmann, *supra* note 83.

98. *Gordon*, 345 F.3d at 925; *Napster*, 239 F.3d at 1022-24; *Fonovisa*, 76 F.3d at 262; see also von Lohmann, *supra* note 83.

99. *Napster*, 239 F.3d at 1023.

100. von Lohmann, *supra* note 83.

101. See, e.g., *Napster*, 239 F.3d at 1004; *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

102. 464 U.S. 417 (1984).

103. The *Sony* Court referred to the respondents’ “attempt to impose copyright liability upon the distributors of copying equipment” as “unprecedented.” *Id.* at 421.

Court refused to hold Sony liable for the actions of customers who used their video tape recorders in an infringing manner.¹⁰⁴ In denying the respondents' ¹⁰⁵ allegations that Sony had committed contributory infringement, ¹⁰⁶ the Court established what has since become known as the Betamax defense.¹⁰⁷ Under this doctrine, "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses" in order for its producer to have a defense to an allegation of contributory infringement.¹⁰⁸ The *Sony* Court found that the video tape recorders' ability to "time-shift"¹⁰⁹ qualified as a substantial noninfringing use and, as a result, held that Sony was not guilty of contributory infringement.¹¹⁰

104. *Id.*

105. Walt Disney Productions joined Universal City Studios, Inc., in bringing this case against Sony. *Id.*

106. Although the respondents did not allege that Sony had committed vicarious infringement, the Court observed

that reasoned analysis of respondents' unprecedented contributory infringement claim necessarily entails consideration of arguments and case law which may also be forwarded under the [the labels of direct and vicarious infringement], and indeed the parties to a large extent rely upon such arguments and authority in support of their respective positions on the issue of contributory infringement.

Id. at 435 n.17. The *Sony* court thus provided an in-depth discussion of the doctrine of vicarious infringement within their analysis of the contributory infringement claim. *Id.* at 439. Since the issue of vicarious infringement was not before the court, however, the discussion pertaining to it was merely non-binding dicta. *See id.*

107. von Lohmann, *supra* note 83. The Betamax defense instructs us that the sale or distribution of a product "does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes." *Sony*, 464 U.S. at 442. The Court reasoned:

It seems extraordinary to suggest that the Copyright Act confers upon all copyright owners collectively, much less the two respondents in this case, the exclusive right to distribute VTR's [sic] simply because they may be used to infringe copyrights. That, however, is the logical implication of their claim. The request for an injunction below indicates that respondents seek, in effect, to declare VTR's [sic] contraband.

Id. at 441 n.21. The *Sony* court repeatedly referred to the Betamax as a VTR, short for "video tape recorder." *See generally id.* at 417. At least for our purposes, there is no more difference between a VTR and a VCR than there is between the AM and FM bands on a radio dial: They both accomplish the same purpose, they just do it in a slightly different manner. *See Betamax*, Wikipedia: The Free Encyclopedia, at <http://en.wikipedia.org/wiki/Betamax> (last visited Feb. 14, 2004) (on file with author) (providing an excellent comparison of the Betamax and VHS formats, and explaining why the former failed even though it is still considered to be vastly superior to the latter). As one can easily determine from reading this article, the terms "VTR" and "VCR" are used interchangeably.

108. *Sony*, 464 U.S. at 442. It is worth noting that the Betamax defense does not extend to claims of vicarious infringement. *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022-23 (9th Cir. 2001) (noting that, since the issue of vicarious liability was not before the *Sony* court, any discussion thereof was only non-binding dicta).

109. "Time-shifting" is the act of using a VCR to record a program that is being televised at a time when the VCR owner cannot watch it, in order for that person to be able to watch it later. *Sony*, 464 U.S. at 421.

110. *Id.* at 442, 456.

The Betamax defense is of great importance to the litigation pertaining to the legality of various file-sharing programs.¹¹¹ This doctrine, which has been applied inconsistently by various federal appellate courts,¹¹² was recently revisited by the Supreme Court.¹¹³ The Court's *Grokster* opinion is expected in July 2005¹¹⁴ and will undoubtedly have profound effects on the file-sharing community for years to come.

IV. BASIC FILE-SHARING RIGHTS

As demonstrated above, there are two basic categories of infringement: direct and secondary.¹¹⁵ The RIAA uses theories of secondary infringement in its attempt to shut down the makers of P2P file-sharing software.¹¹⁶ In contrast to this, it is the file-sharers themselves who may face allegations of direct infringement for sharing MP3 files.¹¹⁷

A. *Why Is It Illegal to Share MP3s, and What Are the Penalties for Doing So?*

It is not illegal to share MP3s *per se*; it's only illegal to share MP3s that are digital recordings of *copyrighted* songs.¹¹⁸ Sharing a copyrighted song is

111. See, e.g., *Napster*, 239 F.3d at 1019-22; *In re Aimster Copyright Litig.*, 334 F.3d 643, 647-54 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004); *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035-43 (C.D. Cal. 2003).

112. In its recent *Grokster* decision, the Ninth Circuit was "mindful that the Seventh Circuit has read Sony's substantial noninfringing use standard differently." *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1162 n.9 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004). Under the Ninth Circuit's interpretation of the Betamax doctrine, plaintiffs may get around the teachings of *Sony* if they can demonstrate that the makers of a product with substantial noninfringing uses "had reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement." *Id.* at 1161. Further adding to the confusion, the Ninth Circuit stated in its earlier *Napster* decision that "[r]egardless of the number of Napster's infringing versus noninfringing uses, the evidentiary record here supported the district court's finding that plaintiffs would likely prevail in establishing that Napster knew or had reason to know of its users' infringement of plaintiffs' copyrights." *Napster*, 239 F.3d at 1021.

In contrast to the above, Judge Posner of the Seventh Circuit has stated that "[t]he Supreme Court made clear in the *Sony* decision that the producer of a product that has substantial non-infringing uses is not a contributory infringer merely because some of the uses actually made of the product . . . are infringing." *Aimster*, 334 F.3d at 647. The Fifth Circuit also spoke on this doctrine in 1988, opining that the *Sony* "Court held that . . . the sale of a product 'does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.'" *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 262 (5th Cir. 1988) (quoting *Sony*, 464 U.S. at 442).

113. The Supreme Court heard oral arguments in the *Grokster* litigation on March 29, 2005, and a ruling is expected by the end of the 2004-2005 term. Jonathan Krim, *Court Weighs File Sharing: Technology Advances vs. Copyrights in Grokster Case*, WASH. POST, Mar. 30, 2005, at E01.

114. *Id.*

115. See *supra* Part III.B.

116. See *infra* Part V (discussing the legality of file-sharing programs).

117. See, e.g., *Recording Indus. Ass'n of Am. v. Verizon Internet Serv's, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004).

118. Eliot Van Buskirk, *The RIAA Lawsuits Clarified Once and for All*, CNET.com, Sept. 24, 2003, at http://reviews.cnet.com/4520-6450_7-5081098-1.html?tag=txt (last visited Feb. 3, 2004) (on file with author). Although it is also illegal to *download* copyrighted music files, the RIAA is

a violation of copyright law, which has its basis in Article I of the U.S. Constitution,¹¹⁹ and is also codified in Title 17 of the United States Code. The Digital Millennium Copyright Act of 1998 (DMCA) specifically extended copyright protection to cover, *inter alia*, digital media and the internet.¹²⁰

Illegally sharing a copyrighted song is an example of direct infringement.¹²¹ The statutory penalty for direct infringement may be as high as \$150,000 per infringed work if the infringement was willful,¹²² and may also include injunctive relief,¹²³ impoundment and possible destruction of the equipment used to commit the infringing activity,¹²⁴ and even imprisonment.¹²⁵

Because the potential penalties for copyright infringement are so great, defendants are generally forced to settle their lawsuits out of court.¹²⁶ This is especially true since all of the RIAA's lawsuits to date have been aimed at people who are accused of sharing an average of 800 songs,¹²⁷ meaning that

not currently interested in prosecuting people for *downloading* music. *Id.* Rather, it is focusing its current efforts on suing people who are *sharing* large numbers of copyrighted songs. *Id.*

119. Article I of the U.S. Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST., art. I, § 8, cl. 8.

120. *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, Dec. 1998, available at <http://www.copyright.gov/legislation/dmca.pdf> (last visited Feb. 7, 2004). President Clinton signed the Digital Millennium Copyright Act (DMCA) into law on October 28, 1998. *Id.* at 1. The purpose of the DMCA was to implement "two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA also addresses a number of other significant copyright-related issues," including "the 'Online Copyright Infringement Liability Limitation Act,'" which is codified as Title II of the DMCA. *Id.* Among other things, Title II added a new and much maligned "procedure by which a copyright owner can obtain a subpoena from a federal court ordering [an ISP] to disclose the identity of a subscriber who is *allegedly* engaging in infringing activities." *Id.* at 9 (emphasis added). This procedure is codified at Section 512(h) of the DMCA, 17 U.S.C. § 512(h), and is the subject of an in depth discussion in Part IV.C.1 of this Comment.

121. See Remington, *supra* note 81, at 5.

122. 17 U.S.C. § 504(c)(2).

123. *Id.* § 502.

124. *Id.* § 503.

125. *Id.* § 506(a) (punishing offenders with imprisonment as provided by 18 U.S.C. § 2319). As one prominent attorney noted, such a stiff penalty "doesn't seem like a proportional response. And it doesn't help get artists paid . . . either." Shachtman, *supra* note 9. Fred von Lohmann is an expert in the field of copyright law, particularly as it applies to file-sharing. See Fred von Lohmann, *Senior Intellectual Property Attorney*, EFF.org, at http://www.eff.org/homes/fred_von_lohmann.html (last visited Feb. 17, 2005) (on file with author). He represented Streamcast networks in the *Grokster* litigation. *Id.*

126. See, e.g., *File Traders in Court*, MP3newswire.net, at <http://www.mp3newswire.net/stories/target.html> (last visited Feb. 7, 2004) (on file with author). However, at least two men have plead guilty to federal file-sharing charges. Jon Healey, *2 Plead Guilty in Piracy Case*, L.A. TIMES, Jan. 19, 2005, at C6, available at <http://www.latimes.com/technology/la-fi-piracy19jan19.1.3041155>. story (last visited Jan. 30, 2005). Both men "face up to five years in prison and a \$250,000 fine." *Id.*

127. Katie Dean, *New Flurry of RIAA Lawsuits*, Wired.com, Feb. 17, 2004, at <http://www.wired.com>.

if a defendant were to fight the RIAA and lose he could be looking at a potential fine in the neighborhood of \$120,000,000.¹²⁸ Kekker & Van Nest attorney Michael Page summed up the situation perfectly, stating that he would “love to see one of [the people sued for sharing copyrighted songs] take on the RIAA, but the reality is it just does not make economic sense It would be a martyrdom mission.”¹²⁹

Thus far, the RIAA seems more than willing to settle the lawsuits out of court.¹³⁰ Most of the settlements have been “for between \$2,000 and \$5,000,”¹³¹ although penalties have ranged at least as high as \$25,000 and two years of probation.¹³² In settling the lawsuits, however, the RIAA makes the accused file-sharers admit liability, which may in turn open the door for the government to bring criminal penalties against them.¹³³ Admitting liability could also be a tool for the actual copyright owner to bring a civil suit against the alleged file-sharer.¹³⁴

B. How Does the RIAA Determine Whom to Sue?

In order to go after individual file-sharers, the RIAA must first identify which parties to sue.¹³⁵ The initial step in this process is to obtain the “screen name”¹³⁶ of a user who the RIAA thinks is sharing a large number of

com/news/digiwood/0,1412,62318,00.html (last visited Mar. 2, 2004) (on file with author).

128. A fine of \$150,000 per violation multiplied by 800 violations gives us the astronomical figure of \$120,000,000. See *supra* note 120 and accompanying text.

129. Jason Krause, *Chinks in the Recording Industry's Armor*, ABA Journal e-Report, Sept. 19, 2003 (on file with author).

130. See, e.g., Jason Straziuso, *Download Lawsuits Scare Some, but Song Trading Still Popular*, USA Today.com, at http://www.usatoday.com/tech/webguide/music/2004-02-20-song-swaps_x.htm (Feb. 20, 2004) (last visited Mar. 2, 2004) (on file with author) (noting that 1,445 people have been sued by the RIAA since September 2003, most of whom have settled “for an average of \$3,000 each”). Perhaps this is, at least in part, a wise public relations move on the part of the RIAA. A trial would bring a great deal of media coverage, much of which undoubtedly would be negative towards the RIAA. Even worse for the RIAA is the very real prospect of jury nullification: at least according to a poll taken between March and May of 2003, “a striking 67% of Internet users who download music say they do not care about whether the music they have downloaded is copyrighted.” See Mary Madden & Amanda Lenhart, *Music Downloading, File-sharing and Copyright*, Pew Internet & American Life Project, July 2003, at http://www.pewinternet.org/reports/pdfs/PIP_Copyright_Memo.pdf (last visited Feb. 3, 2004). If anywhere close to sixty-seven percent of the general population shares this disdain for the music industry's copyright war, it could be virtually impossible to convince all twelve people on a criminal jury to find a file-sharing defendant guilty.

131. Krause, *supra* note 129. For example, Brianna LaHara and her mother were forced to settle “with the RIAA for \$2,000” to avoid a potential multi-million dollar verdict. McGuire, *supra* note 61.

132. *File Traders in Court*, *supra* note 126. According to this article, twenty-two-year-old Jeffrey Gerard Levy initially faced a potential penalty of “[t]hree years in prison and a \$250,000 fine for trading 300 song files.” *Id.* Mr. Levy was forced to plead guilty, incurring a large fine in the process, in order to avoid jail time. *Id.*

133. Krause, *supra* note 129.

134. See *id.* The record labels which fund the RIAA generally do not own the copyrights that they are accusing people of infringing upon. *Id.*

135. *Recording Indus. Ass'n of Am. v. Verizon Internet Serv's, Inc.*, 351 F.3d 1229, 1232 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004).

136. A screen name is an alias or a “handle” used to protect the real identity of internet users. *Screen Name*, searchWebServices.com, at <http://searchwebservices.techtarget.com/>

copyrighted songs.¹³⁷ The RIAA accomplishes this by manipulating the P2P programs that it so detests.¹³⁸ Once it obtains a screen name, it can use "the Internet Protocol (IP) address associated with that screen name" to trace that user to his Internet Service Provider (ISP), such as AOL, Earthlink, or Verizon.¹³⁹ The RIAA then needs the help of the ISP to connect that IP address to the person who was using the screen name in question.¹⁴⁰

While this process may seem straightforward, there are many problems that result from it. The most controversial of these issues arose from the way that the RIAA initially attempted to use section 512(h) of the DMCA¹⁴¹ to obtain the personal information of the file-sharers that it wished to sue.¹⁴² Additionally, even though the RIAA may be able to determine what computer was used to commit the infringing activity, there is no way to be certain who was using that computer at the time in question.¹⁴³

1. Problems with Section 512(h)

In its first two rounds of lawsuits, the RIAA used section 512(h) of the Digital Millennium Copyright Act (DMCA) to try to force the ISPs to provide the personal information that it desired.¹⁴⁴ Section 512(h) authorizes the issuance of a subpoena if a copyright owner (or his agent) merely requests "the clerk of any United States district court to issue [such] a subpoena,"¹⁴⁵ as long as the copyright owner or his agent filed the following three items along with his request:¹⁴⁶ (1) "a notification of claimed infringement" that meets the rather minimal requirements of subsection (c)(3)(A);¹⁴⁷ (2) "a proposed subpoena,"¹⁴⁸ and (3) a sworn declaration that the subpoena is being sought for the purpose of obtaining "the identity of an

sDefinition/0,,sid26_gci833124,00.html (last visited Mar. 2, 2004) (on file with author).

137. *Verizon*, 351 F.3d at 1232.

138. See *Frequently Asked Questions About the Recording Industry's Use of "John Doe" Lawsuits*, RIAA.com, at http://www.riaa.com/news/newsletter/012104_faq.asp (last visited Mar. 1, 2004) (on file with author) (explaining how the RIAA collects evidence against file-sharers).

139. *Verizon*, 351 F.3d at 1232.

140. *Id.*

141. 17 U.S.C. § 512(h).

142. See *infra* notes 146-79 and accompanying text.

143. See *infra* notes 180-83 and accompanying text.

144. *Verizon*, 351 F.3d at 1232. The RIAA attempted to use section 512(h) in this manner while filing its first two rounds of lawsuits. Dean, *supra* note 127. Since Judge Ginsburg issued his appellate ruling in *Verizon*, the RIAA has apparently retreated from this position, finally deciding to play by the same rules as the rest of the world. *Id.* In its third and fourth rounds of lawsuits, the RIAA filed suit against John Does identified by their IP address. *Id.* After a lawsuit is properly filed, the RIAA can then use the standard subpoena procedure to obtain the personal information it needs from the ISP.

145. 17 U.S.C. § 512(h)(1).

146. *Id.* § 512(h)(2).

147. *Id.* § 512(h)(2)(A), (c)(3)(A).

148. *Id.* § 512(h)(2)(B).

alleged infringer and that such information will only be used for the purpose of protecting” the copyright holder’s rights.¹⁴⁹ Assuming that the subpoena request satisfies these minimal requirements, the clerk must “expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the” ISP.¹⁵⁰

Numerous legal issues have arisen pertaining to section 512(h), which has been perhaps the most controversial provision of the DMCA.¹⁵¹ The most important of those issues was the claim by the ISPs that section 512(h) did not apply to them.¹⁵² Additionally, the ISPs also claimed that section 512(h) was unconstitutional.¹⁵³ It is worth noting at this point that, in the wake of the RIAA’s use of “John Doe” lawsuits in its last two rounds of

149. *Id.* § 512(h)(2)(C).

150. *Id.* § 512(h)(4).

151. In addition to the issues discussed in depth in the main text of Part IV.C.1, there was also another minor issue created by the RIAA’s usage of section 512(h): What are the jurisdictional limits of subpoenas issued pursuant to that section?

In the sister cases of *Boston College v. Recording Industry Association of America*, Misc. Act. No. 1:03-MC-10210-JLT (D. Mass. Aug. 7, 2003), available at <http://www.eff.org/IP/P2P/RIAA-v-bc-order-to-quash.pdf>, and *Massachusetts Institute of Technology v. Recording Industry Association of America*, Misc. Act. No. 1:03-MC-10209-JLT (D. Mass. Aug. 7, 2003), available at <http://www.eff.org/IP/P2P/RIAA-v-mit-order-to-quash.pdf>, the Massachusetts District Court held that FED. R. CIV. P. 45(a)(2) and (b)(2) govern subpoenas issued under section 512(h) of the DMCA. In both of these cases, the RIAA obtained subpoenas from the United States District Court for the District of Columbia, pursuant to section 512(h) of the DMCA. Katie Dean, *Schools Rebuke Music Biz Demands*, July 23, 2003, *Wired.com*, at <http://www.wired.com/news/digiwood/0,1412,59726,00.html> (last visited Jan. 27, 2004) (on file with author). The RIAA then served the subpoenas on the two Massachusetts schools, seeking personal information about students suspected of illegally sharing copyrighted music files. *Id.*

Both schools simultaneously challenged the subpoenas on the ground that they violated the aforementioned Federal Rules of Civil Procedure since “they were served on [the respective schools in] Massachusetts, outside the district of the District Court for the District of Columbia, from which the subpoena was issued, and more than 100 miles from Washington, D.C., the place designated for production.” Motion of Boston College to Quash Subpoenas and for a Protective Order Pursuant to FED. R. CIV. P. 45(c)(3)(A), *In re Subpoenas to Boston College*, Misc. Act. Nos. 1:03-MS00259, 1:03-MS00278, and 1:03-MC00872, available at <http://www.eff.org/IP/P2P/boston1.pdf> (on file with author); see also Motion of the Massachusetts Institute of Technology to Quash Subpoena and for a Protective Order Pursuant to FED. R. CIV. P. 45(c)(3)(A), *In re Subpoena to the Massachusetts Institute of Technology*, Misc. Act. No. 1:03-MS-002, available at <http://www.eff.org/IP/P2P/mit-quash.pdf> (on file with author).

In separate Orders, each of which was one paragraph long, the United States District Court for the District of Massachusetts agreed with the schools that the subpoenas did indeed violate the aforementioned Federal Rules of Civil Procedure. Order Granting Plaintiff’s Motion to Quash Subpoena and for Protective Order, *Boston Coll. v. Recording Indus. Ass’n of Am.*, Misc. Act. No. 1:03-MC-10210-JLT (D. Mass. Aug. 7, 2003), available at <http://www.eff.org/IP/P2P/RIAA-v-bc-order-to-quash.pdf> (on file with author); Order Granting Plaintiff’s Motion to Quash Subpoena and for Protective Order, *Mass. Inst. of Tech. v. Recording Indus. Ass’n of Am.*, Misc. Act. No. 1:03-MC-10209-JLT (D. Mass. Aug. 7, 2003), available at <http://www.eff.org/IP/P2P/RIAA-v-mit-order-to-quash.pdf> (on file with author). At least from the point of view of the Massachusetts District Court, it appears that section 512(h) subpoenas are only valid in the district in which they are issued.

152. *Recording Indus. Ass’n of Am. v. Verizon Internet Serv’s, Inc.*, 351 F.3d 1229, 1231 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 309 (2004).

153. *Id.*

lawsuits, the legality of section 512(h) is not as important as it was just a few short months ago.¹⁵⁴

a. Section 512(h) Does Not Apply to Internet Service Providers

Some Internet Service Providers refused to comply with the subpoenas, choosing instead to challenge their validity in federal court.¹⁵⁵ Leading the way was Verizon, which filed suit against the RIAA in the U.S. District Court for the District of Columbia.¹⁵⁶ Following hot on their heels were Pacific Bell¹⁵⁷ and Charter Communications.¹⁵⁸ All three of these ISPs challenged the subpoenas on both statutory and constitutional grounds.¹⁵⁹ The instant section of this Comment is concerned only with their statutory argument; the ISPs constitutional arguments will be discussed later.

Verizon argued that “[section] 512(h) does not authorize the issuance of a subpoena to an ISP acting solely as a conduit for communications the content of which is determined by others.”¹⁶⁰ In other words, Verizon contended that section 512(h) only authorized subpoenas to be served on ISPs who actually stored infringing material on their servers.¹⁶¹ Based on this reasoning, Verizon argued that section 512(h) should not apply to them because they did not store any infringing materials on their servers; they merely provided an internet connection for users who happened to store infringing material on their own computers.¹⁶²

The Court of Appeals for the District of Columbia agreed with Verizon.¹⁶³ In overturning the district court, the appellate court first looked to the text of the statute itself.¹⁶⁴ The court concluded that, based on both the “terms” and “structure” of the statute, section 512(h) does not apply to ISPs that function as “a mere conduit.”¹⁶⁵ Judge Ginsburg went so far as to opine

154. These lawsuits may raise new legal issues, however, especially pertaining to jurisdiction and where a plaintiff can force a file-sharer to go in order to defend a lawsuit. See Dean, *supra* note 127.

155. See, e.g., *Verizon*, 351 F.3d at 1231.

156. *Id.* at 1229.

157. Compl., *Pac. Bell Internet Servs. v. Recording Indus. Ass'n of Am.*, No. C-03-3560 (SI) (N.D. Cal. July 30, 2003), available at http://www.eff.org/IP/P2P/PacBell_v_RIAA.pdf (last visited Apr. 8, 2005) [hereinafter *Pac. Bell Compl.*].

158. Mot. to Quash Subpoena Served by Recording Indus. Ass'n of Am., *In re Charter Comm., Inc.*, Misc. Act. No. 4:03MC00273CEJ (E.D. Mo. Oct. 3, 2003), available at http://www.eff.org/IP/P2P/20031003_motion_to_quash.pdf (last visited Apr. 8, 2005) [hereinafter *Charter Comm. Mot. to Quash*].

159. *Verizon*, 351 F.3d at 1229; *Pac. Bell Compl.*, *supra* note 157; *Charter Comm. Mot. to Quash*, *supra* note 158.

160. *Verizon*, 351 F.3d at 1231.

161. *Id.* at 1233.

162. *Id.* at 1235.

163. *Id.* at 1236.

164. *Id.* at 1234.

165. *Id.* at 1234-37.

that the RIAA's "argument borders upon the silly. The details of [their] argument need not burden the Federal Reporter" ¹⁶⁶

The RIAA also argued that the legislative history of the DMCA supported its claim that section 512(h) was meant to apply to the current situation. ¹⁶⁷ Although it was unnecessary to reach a conclusion on this argument, ¹⁶⁸ the court nonetheless pointed out that "the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works." ¹⁶⁹ The court's reasoning on this point was very straightforward: "P2P software was 'not even a glimmer in anyone's eye when the DMCA was enacted.'" ¹⁷⁰ As such, "Congress had no reason to foresee the application of § 512(h) to P2P file sharing, nor did they draft the DMCA broadly enough to reach the new technology when it came along." ¹⁷¹

Lastly, the RIAA tried to argue that "Verizon's interpretation of the statute 'would defeat the core objectives' of the [DMCA]." ¹⁷² Although the Court of Appeals expressed sympathy for "the RIAA's concern regarding the widespread infringement of its members' copyrights," and also recognized "the need for legal tools to protect those rights," it correctly concluded that it was up to Congress to make any necessary changes to the law; the province of the judicial system is merely to interpret those laws, not to change them. ¹⁷³

b. Section 512(h) May Not Be Constitutional

In addition to the above statutory argument, there are at least three reasons why Section 512(h) may not be constitutional: (1) an Article III court, specifically a federal district court, does not have the power to issue a subpoena unless there is an underlying "case or controversy;" ¹⁷⁴ (2) section 512(h) violates the First Amendment because it does not sufficiently protect the privacy rights of internet users; ¹⁷⁵ and (3) it violates due process. ¹⁷⁶ To date, no court has ruled on the constitutionality of Section 512(h). ¹⁷⁷

166. *Id.* at 1236.

167. *Id.* at 1237.

168. *Id.* The court noted that "[l]egislative history can serve to inform the court's reading of an otherwise ambiguous text; it cannot lead the court to contradict the legislation itself." *Id.*

169. *Id.* at 1238.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 1231.

175. *Id.*

176. Note that this argument was not actually advanced by Verizon; rather, it was advanced only by the amici so the court did not actually consider it. *See*

Br. of Amici Curiae in Support of Verizon's Opp'n to Mot. to Enforce Subpoena, *In re Verizon Internet Servs., Inc.*, Misc. Act. No. 1:02ms00323 (D.D.C. Sept. 9, 2002), available at http://www.ef.org/legal/cases/RIAA_v_Verizon/20020913_ccia_amicus_brief.pdf (last visited Apr. 8, 2005).

177. Since *Verizon* was decided on statutory grounds, the District of Columbia Circuit Court of Appeals did not discuss any of these constitutional arguments. *Verizon*, 351 F.3d at 1231.

Moreover, since the RIAA appears to have abandoned its use of section 512(h) in favor of John Doe lawsuits,¹⁷⁸ there is a very good possibility that no court will ever have to rule on these issues, at least not in the context of file-sharing. Since these issues appear to be moot, at least for the foreseeable future, this Comment will not provide an in-depth discussion of them.¹⁷⁹

2. "It Wasn't Me" – An Old Defense to a Modern Charge

As mentioned above, the RIAA is able to obtain the IP address of the computer where the infringing activity took place, and it can then subpoena the ISP to find out the personal information of the user, based on that IP address.¹⁸⁰ In reality, however, all that the ISP can provide is the personal information of the user whose name is on the internet account; short of one family member testifying against another, or a roommate turning in his best friend,¹⁸¹ there is no way for the RIAA to prove that the person who pays for the internet account was actually the one that was downloading the files.

As a result, unsuspecting parents may be sued for the actions of their children.¹⁸² It is one thing to hold a parent accountable if his mischievous son vandalizes his neighbor's yard; it is something entirely different to subject that parent to potential fines in the millions of dollars because his son shared music over the internet.¹⁸³ Even worse is that the RIAA itself admits that "the majority of the users . . . were unable to tell what files they were sharing, and sometimes incorrectly assumed they were not sharing any files when in fact they were sharing all files on their hard drive."¹⁸⁴ If

178. See, e.g., Dean, *supra* note 127.

179. A sufficient analysis of these issues would require an amount of coverage that would be vastly disproportionate to the current importance of the issue. This is particularly true since no court has spoken on the constitutionality of section 512(h). If the reader is interested in a more thorough analysis of the arguments surrounding these issues, he should read the briefs available at *RIAA v. Verizon Case Archive*, EFF.org, at http://www.eff.org/legal/cases/RIAA_v_Verizon/ (last visited Mar. 3, 2004) (on file with author).

180. *Verizon*, 351 F.3d at 1231-33.

181. Even so, the evidence would likely only be circumstantial; the roommate whose name was on the account would most likely not be able to say for sure exactly who was using the account at the date and time in question.

182. "The recording industry said it named as the defendant in each lawsuit the person who paid for the household Internet account." *Music Industry Settles Copyright Lawsuit Against 12-year-old Girl*, *supra* note 10.

183. Apparently some of our congressmen do not see the problem with this: Senator Orrin Hatch said, "Yes, there will be kids [named in the lawsuits], but we think it's great that it lets parents know what their kids are doing when they're downloading." Bill Holand, *Congress: Support Grows*, BILLBOARD, Sept. 20, 2003, 1, at 78 (internal quotations omitted). Texas Representative Lamar Smith echoed Senator Hatch's lack of concern for who gets sued: "Whatever the age [of the person being sued], it's still wrong. . . . Parents still need to take responsibility for a child's action." *Id.* at 79.

184. *Backgrounder News Memo Debunking Myths Raised by Verizon in Court Dispute*, *supra* note 86.

technologically savvy teens may not realize that they are sharing songs, their pre-digital revolution parents will certainly have no clue. However, if the parents are the ones that are going to get sued and face astronomical fines because of their children's behavior, their only recourse will be to prohibit their children from using the internet. This is certainly not the result that we want, nor is it something that we can even chance. While this result may save the recording industry's current business model, it will sacrifice the technological future of America's children in the process.¹⁸⁵

C. How Does the RIAA's "Amnesty" Program Work, and What's Wrong with It?

The RIAA is willing "to grant what amounts to amnesty to P2P users who voluntarily identify themselves and pledge to stop illegally sharing music on the Internet."¹⁸⁶ In accordance with this amnesty program,¹⁸⁷ "[t]he RIAA will guarantee not to sue file sharers *who have not yet been identified*" by the RIAA, and who promise in writing to stop sharing copyrighted songs online.¹⁸⁸ As of this writing, at least "1,054 former file sharers have" taken the RIAA up on this offer.¹⁸⁹

At first glance, this seems like a reasonable offer on the part of the RIAA, but upon closer examination it becomes obvious that the amnesty program is not all that it is cracked up to be. According to the complaint filed in *Parke v. Recording Industry Association of America*, this program is an "unlawful, misleading, and fraudulent" business practice.¹⁹⁰

The *Parke* complaint characterizes the RIAA's "guarantee" of amnesty as "hollow and deceptive" because the Clean Slate Program¹⁹¹ does not provide any "real legally binding assurance" to the program's participants that they "will be free from later prosecution by the government or lawsuit by Copyright owners for the very copyright infringement admitted under"

185. It may also sacrifice the financial stability of their parents, should they be faced with potentially astronomical fines, or even a lawyer's bill for a few thousand dollars, an amount many hard-working parents truly cannot afford.

186. *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, RIAA.com, Sept. 8, 2003, at <http://www.riaa.com/news/newsletter/090803.asp> (last visited Feb. 2, 2004) (on file with author).

187. See *Clean Slate Program Description*, MusicUnited.org, at <http://www.musicunited.org/cleanSlateDesc.pdf> (last visited Feb. 2, 2004) (on file with author); *Clean Slate Program Affidavit*, MusicUnited.org, at <http://www.musicunited.org/cleanSlateAffidavit.pdf> (last visited Feb. 2, 2004) (on file with author).

188. *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, *supra* note 186 (emphasis added).

189. *Music Industry Commences New Wave of Legal Action Against Illegal File Sharers*, RIAA.com, at <http://www.riaa.com/news/newsletter/120303.asp> (last visited Feb. 2, 2003) (on file with author).

190. Complaint at ¶ 1, *Parke v. Recording Indus. Ass'n of Am.* (Super. Ct. Cal. Sept. 9, 2003), available at http://www.eff.org/IP/P2P/Parke_v_RIAA/Parke_RIAA_Complaint.pdf.

191. The Clean Slate Program is the RIAA's official name for its offer of amnesty. *Sixty-Four Individuals Agree to Settlements in Copyright Infringement Cases*, RIAA.com, at <http://www.riaa.com/news/newsletter/092903.asp> (last visited Mar. 2, 2004) (on file with author).

this program.¹⁹² In actuality, the “RIAA is only ‘agreeing not to *support or assist* in copyright infringement suits based on past conduct against individuals who’” participate in the amnesty program; this program does not in any way limit the copyright holders themselves from filing their own lawsuit against the people who participate in this program.¹⁹³ Therefore, a person who the RIAA had not yet identified – and may not have ever identified – as a copyright infringer could unwittingly “turn himself in” by taking part in this program; while he may receive amnesty from the RIAA, in doing so he will be simultaneously announcing to the world that he is guilty of sharing copyrighted songs.¹⁹⁴ Furthermore, the participant’s “admission” may end up being used against him if the actual copyright holder later files suit.¹⁹⁵ As of this writing, no court has ruled on the legality of the RIAA’s amnesty program.

V. THE LEGALITY OF FILE-SHARING PROGRAMS

Perhaps the hottest current issue in the file-sharing world is whether the P2P programs themselves (as opposed to the act of file-sharing) are legal. The most important precedent in this area relates to VCRs, not file-sharing programs.¹⁹⁶ In *Sony Corp. of America v. Universal City Studios, Inc.*, a 1984 decision, the Supreme Court established what has since become known as the “Betamax doctrine,” named after the Sony Betamax video tape recorder that was at the heart of that case.¹⁹⁷ The Betamax doctrine teaches that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory [copyright] infringement if the product is . . . capable of substantial noninfringing uses.”¹⁹⁸ Although this rule seems rather straightforward, the courts have applied it in an inconsistent manner.¹⁹⁹ The Betamax doctrine was first applied to the world

192. *Parke*, Complaint at ¶ 1.

193. *Id.* at ¶ 13 (emphasis added).

194. Since the RIAA “doesn’t actually have the authority to grant real protections from civil lawsuits. It doesn’t own any copyrights, and its member labels aren’t bound by this arrangement. This means that you could still be sued by the major record labels that fund the RIAA, songwriters or any other copyright holders.” *Why the RIAA’s “Amnesty” Offer Is a Sham*, EFF.org, at <http://www.eff.org/share/amnesty.php> (last visited Feb. 22, 2004) (on file with author). Moreover, in addition to potential civil liability, “a signed admission of guilt could make you a target for criminal prosecution under the No Electronic Theft Act (NET Act). Any interested federal authority could . . . potentially pursue remedies from enormous fines to prison time.” *Id.*

195. *Parke*, Complaint at ¶ 14.

196. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 417 (1984); see also *In re Aimster Copyright Litig.*, 334 F.3d 643, 647-54 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004) (discussing *Sony* and the Betamax VCR in great detail); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-22 (9th Cir. 2001) (same).

197. *Sony*, 464 U.S. at 442; see also discussion *supra* Part III.B.1 (“The Betamax Defense”).

198. *Sony*, 464 U.S. at 442; see also discussion *supra* Part III.B.1 (“The Betamax Defense”).

199. Compare *Napster*, 239 F.3d at 1020-22 (holding that the Betamax doctrine prevented the court from imputing constructive knowledge of infringement, but it did not serve as a complete

of file-sharing in the *Napster* litigation, resulting in the demise of the original P2P program.²⁰⁰

A. What Happened to Napster?

The simple answer is that Napster was unable to withstand the financial burden of prolonged litigation with the recording industry, and was therefore forced into bankruptcy before its case could be fully resolved.²⁰¹ A&M Records²⁰² initially sued Napster in the United States District Court for the Northern District of California, alleging that Napster had committed both contributory and vicarious infringement.²⁰³ After the district court granted a preliminary injunction in favor of the plaintiffs,²⁰⁴ Napster appealed to the Ninth Circuit Court of Appeals.²⁰⁵ The Ninth Circuit remanded the case to the district court with an order to modify the preliminary injunction to “place the burden on [the] plaintiffs to provide notice to Napster of copyrighted works . . . available on the Napster system before Napster has the duty to disable access to the offending content.”²⁰⁶ As a result, once the various record labels notified Napster that specific copyrighted songs were being shared over its network, Napster was forced to “filter” out access to all of

defense to contributory infringement), *with Aimster*, 334 F.3d at 647-54 (holding that the Betamax doctrine did serve as a complete defense to contributory infringement, but still finding Aimster liable for that offense because they did not assert any substantial noninfringing uses of their product), and *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1160-63 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004) (holding that the Betamax doctrine prevented the court from imputing constructive knowledge of infringement, and since the defendants also lacked actual knowledge of the infringement, the charge of contributory infringement was correctly dismissed on summary judgment by the district court), and *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 261-70 (5th Cir. 1988) (holding that the defendant’s actions did not constitute contributory infringement since the product in question was capable of substantial noninfringing uses).

200. Although a plethora of articles have been written about *Napster*, a brief summary is necessary here to lay the foundation for the rest of this discussion. If the reader would like to learn more about *Napster*, there are many excellent articles that cover the case in greater depth than this Comment will. See, e.g., Lisa M. Zepeda, Note, *A&M Records, Inc. v. Napster, Inc.*, 17 *BERKELEY TECH. L.J.* 71 (2002); Stephanie Greene, *Reconciling Napster with the Sony Decision and Recent Amendments to Copyright Law*, 39 *AM. BUS. L.J.* 57 (2001).

201. See von Lohmann, *supra* note 83. Napster has recently reinvented itself as a legal “online music store” named Napster 2.0. See *Napster.com*, at <http://www.napster.com/> (last visited Jan. 26, 2004) (on file with author). As of this writing, Napster 2.0 offers over 1,000,000 songs for downloading at the very reasonable cost of 99 cents per song or as little as \$6.95 per album. *Napster.com Tutorial*, at <http://www.napster.com/tutorial/overview3.html> (last visited Apr. 6, 2005) (on file with author). In the alternative, a music lover may pay \$14.95 per month for unlimited downloads. *Napster To Go*, at <http://www.napster.com/ntg.html> (last visited Apr. 6, 2005) (on file with author).

202. *A&M Records, Inc.*, was joined in this lawsuit by seventeen other major record labels, including Sony Music Entertainment, Inc. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000).

203. *Id.* at 900.

204. *Id.* at 901.

205. *Napster*, 239 F.3d at 1004.

206. *Id.* at 1027. The Ninth Circuit noted that, in addition to being required to remove copyrighted files from its system once it is notified of the presence of such files, Napster “also bears the burden of policing the system within the limits of the system.” *Id.*

those songs.²⁰⁷ Napster tried in vain to implement filtering methods that complied with the Ninth Circuit's mandate, but the burden was too great.²⁰⁸ The end result for the original Napster was bankruptcy.²⁰⁹

The *Napster* decision, however, was not as simple as it might appear. In the process of carving out its opinion, the Ninth Circuit established important precedents pertaining to both contributory and vicarious infringement.²¹⁰ As a result, *Napster* plays an important role in any litigation pertaining to the legality of P2P software,²¹¹ particularly in the Ninth Circuit.²¹²

1. Contributory Infringement

As previously discussed, in addition to proving that someone was guilty of direct infringement,²¹³ there are two other elements to a claim of contributory infringement: (1) knowledge and (2) material contribution.²¹⁴ The Ninth Circuit correctly concluded that Napster "had actual [knowledge] of direct infringement because the RIAA informed it [that] more than 12,000 infringing files" existed on the Napster P2P network.²¹⁵ It was also correct in agreeing with the district court that "Napster materially contributes to the infringing activity" by providing "support services" as well as "the site and

207. von Lohmann, *supra* note 83.

208. *Id.*

209. *Id.*

210. See discussion *infra* Part V.A.1.

211. See, e.g., *In re Aimster Copyright Litig.*, 334 F.3d 643, 649-54 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004); see also von Lohmann, *supra* note 83.

212. The Ninth Circuit Court of Appeals encompasses, *inter alia*, the state of California, which is home to the entertainment industry. Office of the Circuit Executive, United States Courts for the Ninth Circuit at <http://www.ce9.uscourts.gov/> (last visited Mar. 2, 2004). As such, the Ninth Circuit plays a central role in most litigation involving the music industry. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1004 (9th Cir. 2001); *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

213. *Grokster*, 380 F.3d at 1160. In its opinion, the Ninth Circuit affirmed the district court's holding "that Napster users do not have a fair use defense" to direct infringement before reaching the issues of contributory and vicarious infringement. *Napster*, 239 F.3d at 1019. For our purposes, this discussion was important only to the extent that it established that Napster users were guilty of direct infringement, which is a prerequisite to both contributory and vicarious infringement. See discussion *supra* Part III.B.

214. The first of these elements requires that the defendant had either actual or constructive knowledge of the infringing activity. *Napster*, 239 F.3d at 1020 (noting that "[c]ontributory liability requires that the secondary infringer 'know or have reason to know' of direct infringement"); see also discussion *supra* Part III.B. The second element requires that the defendant facilitated, encouraged, assisted, or otherwise materially contributed to the infringing activity. See *Napster*, 239 F.3d at 1019; see also discussion *supra* Part III.B.

215. *Napster*, 239 F.3d at 1022 n.6; see also *id.* at 1020 n.5 (explaining reasons why district court found Napster to have both actual and constructive knowledge of the infringing activities of its users).

facilities” that enable its users to infringe upon copyrights.²¹⁶ Where the Ninth Circuit erred, however, was in its application of the *Sony* Betamax doctrine,²¹⁷ which the Supreme Court intended to serve as a complete defense to contributory infringement.²¹⁸

As noted above, the *Sony* Betamax doctrine teaches that the sale of an article of commerce “*does not constitute contributory infringement* if the product is . . . capable of substantial noninfringing uses.”²¹⁹ The plain language of this rule tells us that the Betamax doctrine was intended to serve as a complete defense to a claim of contributory infringement.²²⁰ The Ninth Circuit, however, interpreted *Sony* to mean only that a court cannot impute *constructive* knowledge to the maker of P2P software “merely because [their] peer-to-peer file sharing technology may be used to infringe plaintiffs’ copyrights.”²²¹ Based on this interpretation, Ninth Circuit plaintiffs may still establish liability for contributory infringement if they can prove that the defendant had *actual* knowledge of the infringing activity,²²² even if the product has substantial noninfringing uses.²²³ As a

216. *Id.* at 1022. Napster maintained clusters of servers which stored a centralized index of the songs available on their network and facilitated the transfer of files over that network. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 896, 905-08 (N.D. Cal. 2000).

217. *Napster*, 239 F.3d at 1019-22.

218. See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 9.8[B] (3d ed. 1999) (“In [their *Sony*] decision, the Supreme Court borrowed a principle from patent law that manufacturers of staple articles of commerce, suitable for substantial non-infringing uses, cannot be held as contributory infringers. Otherwise, a finding of contributory infringement would give the plaintiff effective control over the use of the item, placing it within the plaintiff’s copyright monopoly. After *Sony*, the seller . . . of copying equipment . . . will not be liable as a contributory infringer even if some buyers will predictably use the machine to infringe copyright.”).

219. *Sony*, 464 U.S. at 442 (emphasis added); see also discussion *supra* Part III.B.1.

220. See, e.g., *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 261, 262 (5th Cir. 1988) (“The [*Sony*] Court held that . . . the sale of a product ‘does not constitute contributory infringement if the product is . . . capable of substantial noninfringing uses.’”).

221. *Napster*, 239 F.3d at 1020-21. After opining that “Napster’s actual, specific knowledge of direct infringement renders *Sony*’s holding of limited assistance to Napster,” the Ninth Circuit explained its position by stating – incorrectly – that in “adopting a modified ‘staple article of commerce’ doctrine from patent law,” the Supreme Court “declined to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and ‘substantial noninfringing uses.’” *Id.* at 1020 (emphasis added). A close reading of *Sony* reveals that this statement is incorrect; the *Sony* Court intended the Betamax doctrine to serve as a complete defense to contributory infringement, not just the “knowledge” element thereof. See *Sony*, 464 U.S. at 442 (stating that since “[t]he staple article of commerce doctrine must strike a balance between a copyright holder’s legitimate demand for effective . . . protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce,” it follows that the sale of an article of commerce “*does not constitute contributory infringement if the product is . . . capable of substantial noninfringing uses*.” The [only] question is thus whether the Betamax is capable of commercially significant noninfringing uses.”) (emphasis added).

222. Keep in mind that, in order to prevail on an allegation of contributory infringement, a plaintiff must also show that there was a material contribution to the direct infringement. See discussion *supra* Part III.B.

223. *Napster*, 239 F.3d at 1020-21 (stating that “[r]egardless of the number of Napster’s infringing versus noninfringing uses, the evidentiary record here supported the district court’s finding that plaintiffs would likely prevail in establishing that Napster knew or had reason to know of its users’ infringement of plaintiffs’ copyrights.” (emphasis added)); see also *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1036 (C.D. Cal. 2003), *aff’d*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (2004) (noting that the Ninth Circuit refused to hold Napster liable for

result of this flawed logic,²²⁴ the court found Napster liable for contributory infringement because it had “*actual* knowledge that *specific* infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material.”²²⁵

After *Napster*, the Betamax doctrine does not appear to be a valid defense in the Ninth Circuit for companies that produce file-sharing programs and are defending themselves against claims of contributory infringement.²²⁶ Under the current state of the law in the Ninth Circuit, it appears that the makers of a file-sharing program cannot be charged with having *constructive* knowledge of the infringing activities of their users, assuming that their program has substantial noninfringing uses.²²⁷ However, if the copyright holder proves that the defendant had *actual* knowledge of the infringing activity, then the defendant can only avoid liability for contributory infringement if it did not have that knowledge “at a time when [the defendant] materially contributes to the alleged infringement, and can therefore do something about it.”²²⁸ As a result, whether or not the program has a substantial noninfringing use appears to only have relevance in establishing knowledge.²²⁹

contributory infringement “simply because it distributed software that could be used to infringe copyrights. . . . Rather, liability for contributory infringement accrues where a defendant has actual – not merely constructive – knowledge of the infringement. . . .”). The Ninth Circuit gave the plaintiffs the burden “to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content. Napster, however, also bears the burden of policing the system within the limits of the system.” *Napster*, 239 F.3d at 1027.

224. See *In re Aimster Copyright Litig.*, 334 F.3d 643, 649 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004) (“The [Sony] Court was unwilling to allow copyright holders to prevent infringement effectuated by means of a new technology at the price of possibly denying noninfringing consumers the benefit of the technology. We therefore agree . . . that the Ninth Circuit erred in [*Napster*] in suggesting that actual knowledge of specific infringing uses is a sufficient condition for deeming a facilitator a contributory infringer.”). The Seventh Circuit still held Aimster liable for contributory infringement, but only because Aimster “failed to produce any evidence that its service has ever been used for a noninfringing use.” *Id.* at 653.

225. *Napster*, 239 F.3d at 1022 (emphasis in original).

226. See, e.g., *Grokster*, 380 F.3d at 1161. In its recent *Grokster* opinion, the Ninth Circuit clearly stated that “if the product at issue is capable of substantial or commercially significant noninfringing uses, then the copyright owner” may still establish a claim of contributory infringement if he can “demonstrate that the defendant had reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement.” *Id.* (citing *Napster*, 239 F.3d at 1027) (emphasis removed).

227. *Id.* at 1160 (noting that when a defendant shows “that its product [is] capable of substantial or commercially significant noninfringing uses, then constructive knowledge of the infringement [cannot] be imputed” to that defendant for purposes of a contributory infringement claim).

228. *Grokster*, 259 F. Supp. 2d at 1038; see also *Grokster*, 380 F.3d at 1162-63.

229. *Grokster*, 380 F.3d at 1160-63.

2. Vicarious Infringement

A&M Records also accused Napster of vicarious infringement.²³⁰ Similar to contributory infringement, a plaintiff making a claim under this theory must prove that someone directly infringed upon his or her copyright,²³¹ as well as the following two elements: (1) the defendant derived a direct financial benefit from the infringement, and (2) the defendant had the right and the ability to supervise the third-party direct infringer.²³² The issue of direct infringement was not appealed by Napster.²³³ The Ninth Circuit covered the “financial benefit” element in a single paragraph, agreeing with the district court that Napster did indeed have “a direct financial interest in the infringing” activities of its users.²³⁴ The “supervision” element, however, merits further discussion because it is the element that differentiates Napster from the current group of file-sharing programs, such as Grokster.²³⁵

Napster’s downfall with respect to vicarious infringement was its ability to control the activities of its users.²³⁶ If you have the ability to block your users’ access to the system “for any reason whatsoever,” you can only avoid vicarious liability by exercising that right to its fullest extent.²³⁷ Since “Napster had the right and ability to police its system and failed to exercise that right to prevent the exchange of copyrighted material,”²³⁸ the Ninth Circuit correctly concluded that the supervision element of vicarious infringement was satisfied.²³⁹

B. Why Have the Modern File-Sharing Programs Been Able to Survive?

In the wake of *Napster*, P2P developers appear to have “two options: total control or total anarchy.”²⁴⁰ In other words, they can either create a file-sharing program “that allows for thorough monitoring and control over” their users’ activities, or they can create “one that makes such monitoring

230. See discussion *supra* Part III.B (explaining vicarious infringement); see also discussion *supra* Part III.B.1 (noting that the Betamax defense only applies to claims of contributory infringement, and not claims of vicarious infringement).

231. *Grokster*, 380 F.3d at 1164.

232. See discussion *supra* Part III.B; see also von Lohmann, *supra* note 83.

233. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (pointing out that “the district court’s conclusion that plaintiffs have presented a prima facie case of direct infringement by Napster users is not presently appealed by Napster”).

234. *Id.* at 1023. The Ninth Circuit noted that the district court had determined “that plaintiffs had demonstrated they would likely succeed in establishing that Napster has a direct financial interest” in the infringing activities of their users, especially since “the availability of infringing material [on the Napster system] acts as a draw for customers.” *Id.* (internal quotations omitted).

235. The *Grokster* litigation will be discussed in greater depth *infra* in Part V.B.

236. *Napster*, 239 F.3d at 1023; see also von Lohmann, *supra* note 83.

237. *Napster*, 239 F.3d at 1023.

238. *Id.*

239. *Id.* at 1023-24. Thus, even had the Ninth Circuit correctly interpreted the *Sony Betamax* doctrine to give Napster a complete defense to the allegation of contributory infringement, Napster would have still been liable under this theory. See *id.*

240. von Lohmann, *supra* note 83.

and control impossible.”²⁴¹ Most of the current P2P programs have chosen the latter route.²⁴²

This theory was tested in *MGM Studios, Inc. v. Grokster, Ltd.*, a case originally filed in the United States District Court for the Central District of California.²⁴³ The *Grokster* defendants make file-sharing programs that are similar to Napster, but which lack the ability to monitor and control the activities of their users.²⁴⁴ As a result, Grokster and Morpheus are more like the video tape recorders at issue in *Sony* than Napster was; once they are distributed to consumers, their makers have no knowledge of the activities of those consumers, they do not contribute to those activities, and they lack the ability to control them.²⁴⁵ At least for the time being, this distinction has enabled Grokster and Morpheus to avoid liability for contributory and vicarious infringement,²⁴⁶ thus avoiding the fate of the original Napster.

1. No Material Contribution to Any Infringing Activity

The file-sharing programs at issue in the *Grokster* litigation have substantial noninfringing uses,²⁴⁷ so the defendants could not be charged

241. *Id.* In the former instance, they would avoid liability because they would be able to prevent any and all infringing activity from taking place over their file-sharing network. *See id.* Choosing the second option will allow them to avoid liability for reasons that will become clear after reading this section.

242. As the Ninth Circuit pointed out in *Grokster*, however, peer-to-peer file-sharing programs such as those at issue in that case are “not simply [tools] engineered to get around the holdings of [the *Napster* decisions.] The technology has numerous other uses, significantly reducing the distribution costs of public domain and permissively shared art and speech, as well as reducing the centralized control of that distribution.” *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1164 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

243. 259 F. Supp. 2d 1029, 1034 (C.D. Cal. 2003), *aff’d*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004). The original defendants in *Grokster* were the makers of Grokster, Morpheus, and Kazaa, three modern file-sharing programs. *Id.* at 1031-32. Since this case was initially filed, Kazaa has stopped defending the action and a judgment of default was entered against them. *Id.* at 1032 n.2.

244. *Grokster*, 259 F. Supp. 2d at 1041, 1045 (“*Grokster I*”); *Grokster*, 380 F.3d at 1163, 1165 (“*Grokster II*”). In reaching this conclusion, the Ninth Circuit pointed out that “[t]he sort of monitoring and supervisory relationship that has supported vicarious liability in the past is completely absent in this case.” *Grokster II*, 380 F.3d at 1165. As a result, the file-sharing programs at issue in *Grokster* “are more truly decentralized, peer-to-peer file-sharing networks” than the original Napster was. *Id.*

245. *Grokster II*, 380 F.3d at 1160-66.

246. *Id.* at 1157. The final say will be had by the Supreme Court during its 2004-2005 term. *See MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 686 (2004) (granting certiorari).

247. In fact, thousands of “musical groups have authorized free distribution of their music through the internet.” *Grokster II*, 380 F.3d at 1161. The Ninth Circuit noted one particularly “striking example” of such use. *Id.* The band Wilco, “whose record company had declined to release one of its albums on the basis that it had no commercial potential,” decided to give its album away for free on the internet. *Id.* This decision “sparked widespread interest and, as a result, Wilco received another recording contract.” *Id.*

In addition to music files, file-sharing software “has been used to share thousands of public domain literary works . . . as well as historic public domain films.” *Id.* Furthermore, file-sharing

with having constructive knowledge of the activities of the users of those programs.²⁴⁸ The *Grokster* court thus required actual knowledge of the infringing activities to have existed “at a time at which they contribute[d] to the infringement.”²⁴⁹ Since it was “undisputed that [the] Defendants are generally aware that many of their users employ [their] software to infringe copyrighted works,” the “critical question” in the mind of the court was whether they did “anything, aside from distributing software, to actively facilitate – or whether they could do anything to stop – their users’ infringing activity.”²⁵⁰ Unlike Napster, neither Grokster nor Morpheus “provides the ‘site and facilities’ for direct infringement,”²⁵¹ and as a result, if the defendants “closed their doors and deactivated all computers within their control, users of their products could continue sharing files with little or no interruption.”²⁵² Therefore, the court found that there was no “evidence of active and substantial contribution to the” infringing activities in question.²⁵³ Furthermore, the court also concluded that the defendants were unable to stop those activities.²⁵⁴ The Ninth Circuit thus upheld²⁵⁵ the district court’s grant of summary judgment in favor of the defendants on the issue of contributory infringement.²⁵⁶

software has numerous additional substantial noninfringing uses such as “distributing movie trailers, free songs or other non-copyrighted works; using the software in countries where it is legal; or sharing the works of Shakespeare.” *Grokster I*, 259 F. Supp. 2d at 1035. Both Morpheus and Grokster are “regularly used to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted.” *Id.*

As the Ninth Circuit calculated, “even at a 10% level of legitimate use, as contended by the [RIAA], the volume of use would indicate a *minimum* of hundreds of thousands of legitimate file exchanges.” *Grokster II*, 380 F.3d at 1162 n.10 (emphasis added).

248. *Grokster II*, 380 F.3d at 1162.

249. *Id.* (quoting *Grokster I*, 259 F. Supp. 2d at 1036 (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-22 (9th Cir. 2001))) (internal quotations omitted) (alteration added by Ninth Circuit). As a result of this interpretation, “Plaintiffs’ notices of infringing conduct are irrelevant if they arrive when Defendants do nothing to facilitate, and cannot do anything to stop, the alleged infringement.” *Grokster I*, 259 F. Supp. 2d at 1037; see also *Grokster II*, 380 F.3d at 1162 (quoting the lower court decision with approval). A different rule would not work: Imagine if Xerox could be held liable for contributory infringement if someone used one of its machines to make an illegal copy of a copyrighted file, just because it was notified of the action, even though it could do nothing to stop it. von Lohmann, *supra* note 83.

250. *Grokster I*, 259 F. Supp. 2d at 1038, 1039. The court does not consider “technical assistance and other incidental services [to be] ‘material’ to the alleged infringement.” *Id.* at 1042.

251. *Id.* at 1041; see also *Grokster II*, 380 F.3d at 1163; discussion *supra* Part V.A.1 (discussing the reasons why Napster was held liable for contributory infringement).

252. *Grokster II*, 380 F.3d at 1163 (quoting *Grokster I*, 259 F. Supp. 2d at 1041) (internal quotations omitted). This architecture stands in direct contract to Napster, which “indexed the files contained on each user’s computer,” thus requiring “each and every search request [to pass] through Napster’s servers.” *Grokster I*, 259 F. Supp. 2d at 1041 (citing *Napster*, 239 F.3d at 1012). “Napster provided the ‘site and facilities’ for the alleged infringement, [so if] Napster deactivated its computers, users would no longer be able to share files through the Napster network.” *Id.*

253. *Grokster I*, 259 F. Supp. 2d at 1043; see also *Grokster II*, 380 F.3d at 1163-64.

254. *Grokster I*, 259 F. Supp. 2d at 1041-43, 1045; *Grokster II*, 380 F.3d at 1162-64.

255. *Grokster II*, 380 F.3d at 1160-64.

256. *Grokster I*, 259 F. Supp. 2d at 1043.

2. No Ability to Control the Activities of Their Users

As was the case in *Napster*,²⁵⁷ the issue of vicarious infringement turned on the element of supervision.²⁵⁸ Unlike *Napster*, however, *Grokster* and *Morpheus* do not have the ability to control the networks over which file-sharing takes place.²⁵⁹ Even though those networks are entirely outside the control of the defendants, the plaintiffs still argued that “the software itself could be altered to prevent users from sharing copyrighted files.”²⁶⁰ Although the plaintiffs’ contention is true, the court pointed out that “the obligation to ‘police’ arises only where a defendant has the ‘right and ability’ to supervise the infringing conduct,” which was “not the case here.”²⁶¹ As a result, even though the court was aware of “the possibility that [*Grokster* and *Morpheus*] may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefitting financially from the illicit draw of their wares,” it granted summary judgment to the defendants on this issue.²⁶²

VI. SOLUTIONS AND PREDICTIONS

Any solution to the economic and legal issues confronting the music world must start with the obvious: “Nothing [that the music industry has] done so far has worked. In fact, [they have] made the problem much worse.”²⁶³ Two types of solutions are available to the music industry: economic solutions, and legal ones.

257. See discussion *supra* Part V.A.2.

258. Similar to *Napster*, there was not much debate over whether the defendants derived a financial benefit from the infringing activities of their users. *Grokster II*, 380 F.3d at 1164; *Grokster I*, 259 F. Supp. 2d at 1043-44. The court concluded that it was “clear that Defendants derive a financial benefit from [their users’] infringing conduct” because “[t]he ability to trade copyrighted songs . . . certainly is a ‘draw’ for many users of” the programs in question. *Grokster I*, 259 F. Supp. 2d at 1043. As a result, the defendants were able to attract “a user base in the tens of millions,” enabling them to “derive substantial revenue from advertising.” *Id.* at 1043-44.

259. *Grokster II*, 380 F.3d at 1164-66; *Grokster I*, 259 F. Supp. 2d at 1045. Unlike *Napster*, the software programs in this case did not provide the defendants with the “ability to supervise or control the file-sharing networks,” nor did they permit the defendants “to restrict access to them [or] police what is being traded as *Napster* could.” *Grokster I*, 259 F. Supp. 2d at 1045.

260. *Grokster I*, 259 F. Supp. 2d at 1045.

261. *Id.* (emphasis omitted); see also *Grokster II*, 380 F.3d at 1165-66.

262. *Grokster I*, 259 F. Supp. 2d at 1046; see also *Grokster II*, 380 F.3d at 1167 (affirming the district court’s grant of summary judgment). Both the district court as well as the Ninth Circuit advised the defendants that Congress was the proper forum for their concerns about file-sharing, not the judiciary. *Grokster I*, 259 F. Supp. 2d at 1046; *Grokster II*, 380 F.3d at 1167 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984)).

263. Goldring, *supra* note 1, at 14.

A. Take Advantage of a Golden Economic Opportunity

According to Fred Goldring, a columnist for *Billboard* magazine, “[t]he file-sharing age should be a golden age for artists, because more people are listening to more (and a wider variety of) music than ever before. But every day, the artists are missing out, held hostage by an obstinate industry, paralyzed by fear of impending obsolescence.”²⁶⁴ Another commentator predicted that digital downloads may be a \$1.5 *billion* industry within five years.²⁶⁵ Fortunately for both artists and music lovers, the music industry is finally starting to get with the times²⁶⁶ and offer legal digital downloads at a reasonable price.²⁶⁷ Leading the way so far are services such as iTunes, a creation of Apple Computer, and Napster 2.0.²⁶⁸ Since it appears that “people [are] willing to pay for [digital] downloads, the music should be available because the alternative is losing the sale to free peer-to-peer networks.”²⁶⁹ The entire music world will be better off if the industry recognizes this simple fact and continues to provide customers more of what they want. This strategy is certainly better than suing your customers into oblivion.

B. ACCOPS: Congress’ Attempt to Make a Bad Problem Worse

The Author, Consumer, and Computer Owner Protection and Security Act of 2003, or ACCOPS, is Congress’ latest attempt to stop file-sharing.²⁷⁰ The ACCOPS bill, if passed, would make the penalties for file-sharing more severe than some penalties for drug possession,²⁷¹ further overcrowding American jails in the process.²⁷² Particularly disturbing is the fact that

264. *Id.*

265. Brian Garrity, *How Big Can It Get?*, *BILLBOARD*, Nov. 1, 2003, at 63.

266. This situation is analogous to the introduction of the VCR, which the entertainment industry initially tried to have declared as contraband. *See Sony*, 464 U.S. at 417. Today, the entertainment industry derives substantial revenue from that same VCR, through both sales and rentals of movies. *See Oral Argument of Respondents, MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. Feb. 3, 2004) (Nos. 03-55894 & 03-56236) (emphasis added), available at http://www.eff.org/IP/P2P/MGM_v_Grokster/ (last visited Mar. 2, 2004) (oral argument on file with author in MP3 format) (“Regulating technologies in their infancy is a bad idea. . . . Today, VCR’s garner more income for the music industry than movies. They would not exist had the studios gotten their wish and had them banned.”).

267. *See, e.g.*, Napster.com, <http://www.napster.com/> (last visited Mar. 3, 2004); iTunes, <http://www.apple.com/itunes/> (last visited Mar. 3, 2004).

268. David Pogue, *Paying the Piper, Round 2: The Repertory Grows*, *N.Y. TIMES*, Oct. 30, 2003, at G1.

269. Garrity, *supra* note 67, at 23, 26 (paraphrasing Dan Fraser, who is the “president of Nettwerk Management and manager for such artists as Coldplay, Avril Lavigne and Sarah McLachlan”).

270. H.R. 2752, 108th Cong. (2003).

271. *See* 21 U.S.C. § 841(b)(2) (listing the maximum penalty for an individual in possession of a schedule IV controlled substance as three years in prison and a fine not to exceed \$250,000); *see also id.* § 841(b)(3) (listing the maximum penalty for an individual in possession of a schedule V controlled substance as one year in prison and a fine not to exceed \$100,000); *id.* § 812(c) (grouping various controlled substances by schedule).

272. As one prominent attorney noted, such a stiff penalty “doesn’t seem like a proportional response. And it doesn’t help get artists paid,” either. Shachtman, *supra* note 9.

ACCOPS would make "the uploading of a *single* copyrighted work to a publicly accessible computer network" a felony pursuant to 17 U.S.C. § 506(a).²⁷³ The maximum penalty for a violation of section 506(a) is five years imprisonment as well as a fine.²⁷⁴ A second offense carries a maximum penalty of ten years imprisonment, in addition to a fine.²⁷⁵ This hardly seems like a proportional response to file-sharing.

C. File-Sharing Programs Will Survive, So Take Advantage of Them

In the aftermath of *Napster* and *Grokster*, it appears as though file-sharing programs will survive despite the RIAA's best legal efforts to shut them down.²⁷⁶ As such, it would be in the recording industry's best interests to work with these programs to create a business model, similar to the way that the movie industry and VCR makers work together to provide home movies for sale and rent.²⁷⁷ That way, everybody wins: the music lovers have their MP3s, and the music industry has its money.

S. Representative John Carter, a Republican from Texas, does not agree with Mr. von Lohmann. Representative Carter went as far as to suggest that jailing college students for downloading copyrighted music might be the answer. Katie Dean, *Marking File Traders as Felons*, *Wired.com*, at <http://www.wired.com/news/print/0,1294,58081,00.html> (last visited Dec. 17, 2003) (on file with author). In particular, he believes that "[i]f you were to prosecute someone and give them three years, [then] this would act as a deterrent." *Id.*

273. 149 CONG. REC. E1496 (daily ed. July 17, 2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2003_record&page=E1496&position=all (last visited Feb. 2, 2004).

274. 18 U.S.C. § 2319(b)(1).

275. *Id.* § 2319(b)(2).

276. See discussion *supra* Part V.B. The *Grokster* appeal was heard by the Supreme Court during the 2004-2005 term, with an opinion expected by July 2005. See discussion *supra* Part V. It is likely that the Court would find that file-sharing programs have at least one substantial noninfringing use, e.g., sharing non-copyrighted materials such as the works of Shakespeare, and will therefore refuse to find them liable for contributory infringement. See discussion *supra* Part V. Since they will likely be able to avoid liability for vicarious infringement as well, they will therefore avoid the fate of the original *Napster*. See *id.*

277. During oral arguments in the *Grokster* appeal, *Grokster* attorney Michael Page pointed out:

Regulating technologies in their infancy is a bad idea. Imagine had the Supreme Court agreed with appellants [in the *Sony* case] and had said [that] VCR's [sic] are illegal Today VCR's [sic] garner more income for the music industry than movies. They would not exist had the studios gotten their wish and had them banned. . . . This is not a new theme. Every time a new technology comes along, those with a vested interest in the old technology first ask the courts to ban it. Thankfully, the courts say "no," and when they do, the copyright holders then find a way to make money off that new technology. Because every time technology removes the transaction costs between the artist and the consumer, that leaves money available for the artists. Radio was going to be the death of copyright. [The music industry said,] "How can we compete with free? You're sending our music out into the airwaves for free for anyone to have." But when courts decline to stop technology, people find a way to develop those technologies to further develop non-infringing uses of those technologies and to monetize them, and in the long run it is always good for the consumers and the copyright holders. Efficiency is good for everybody, and these systems are simply more efficient versions of distribution. They

VII. CONCLUSION

Instead of taking advantage of what should be the music industry's "dream," the industry "sued the original Napster into extinction. Now [it is] pursuing the desperate measure of suing [its] own customers for doing what [it] want[s] them to do – accumulate, listen to and recommend music – but just not in the way [it] want[s] them to do it."²⁷⁸ Fortunately for everyone involved, the music industry has "one more chance for survival, but [it] has to break its pattern [of dealing with problems after they happen] and think about trends and the future, rather than . . . last year's methodology."²⁷⁹

As aptly pointed out by an industry insider,

any solution must start with immediately abandoning our heavy-handed strategy of "shock and awe." We're just going to drive our customers further underground – maybe out of reach forever – and make ourselves extinct in the process. People will continue to listen to music, whether we're part of the process or not. The time to start a real dialogue is now.²⁸⁰

For the recording industry's sake, one can only hope that it is not too late to undo the damage it has done by suing and alienating its very own customers. For the music lover's sake, one must hope that the music industry realizes what it is doing before any more "ordinary, otherwise law-abiding people" get dragged into court.²⁸¹

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have now reduced distribution costs, not low, but to zero. Courts should not step in and stop that progress.

Oral Argument of Respondents, *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. Feb. 3, 2004) (Nos. 03-55894 & 03-56236) (emphasis added), available at http://www.eff.org/IP/P2P/MGM_v_Grokster/ (last visited Mar. 2, 2004) (oral argument on file with author in MP3 format).

278. Goldring, *supra* note 1, at 14.

279. Eliot Van Buskirk, *The Record Industry's Last Chance*, CNET.com, at http://reviews.cnet.com/4520-6450_7-5020716-1.html?tag=txt (last visited Feb. 4, 2004) (on file with author).

280. Goldring, *supra* note 1, at 14.

281. *Id.*

282. J.D. Candidate, Pepperdine University School of Law, 2005; B.S., major in Computer Science, minors in Mathematics and Chemistry, Lebanon Valley College, 2000. This article is dedicated to the memories of my mother, Louise Dianne Fedock, and my friend, James Wasakoski, both of whom were taken too soon. I would also like to thank my friends Jennifer Stolarick and Jason Barsanti for the feedback and encouragement that they provided throughout this process.